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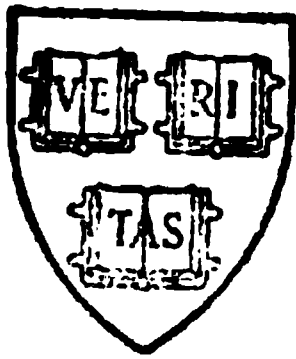
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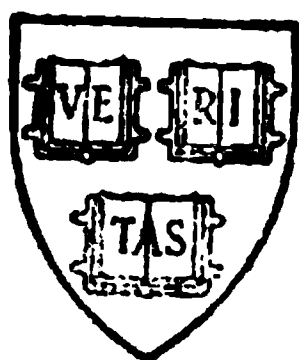
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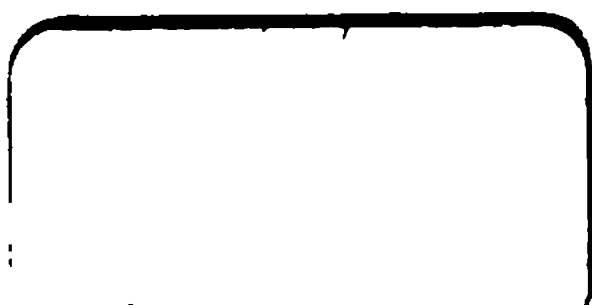
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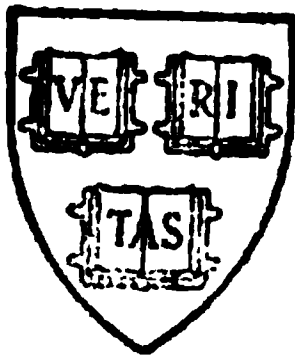


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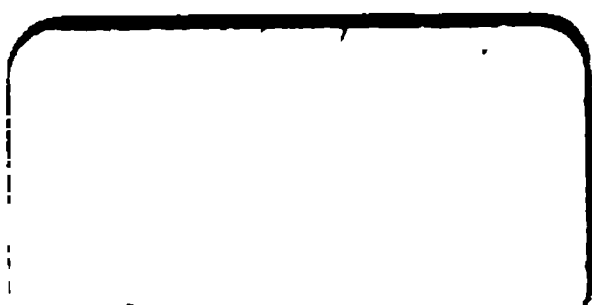


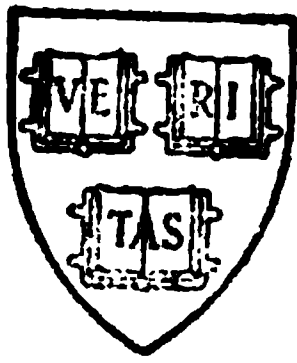
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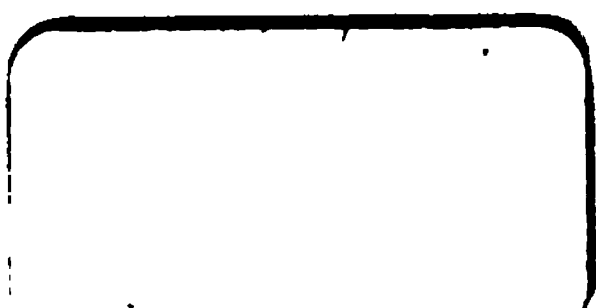


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VOL. 43--INDIANA REPORTS.

INDIANA REPORTS. J'

VOLUME XLIII.

**Stereotyped by
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117
Nov. 7

8

REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

WITH TABLES OF THE CASES REPORTED AND CASES CITED
AND AN INDEX.

BY JAMES B. BLACK,
OFFICIAL REPORTER.

VOL. XLIII.

CONTAINING THE CASES DECIDED AT THE MAY TERM, 1873,
NOT PUBLISHED IN VOLS. XLI. AND XLII., AND CASES
DECIDED AT THE NOVEMBER TERM, 1873.

INDIANAPOLIS:
JOURNAL COMPANY, PRINTERS AND BINDERS.

1874.

Rec. Sept. 15, 1874

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JUDGES
OF THE
SUPREME COURT OF JUDICATURE

DURING THE TIME OF THESE REPORTS.

ANDREW L. OSBORN, LL. D.*

ALEXANDER C. DOWNEY, LL. D.†

JAMES L. WORDEN, LL. D.

SAMUEL H. BUSKIRK, LL. D.

JOHN PETTIT, LL. D.

***Chief Justice at the May term, 1873.**

†Chief Justice at the November term, 1873.

OFFICERS
OF THE
SUPREME COURT OF JUDICATURE.

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HON. JAMES C. DENNY.

REPORTER,
JAMES B. BLACK.

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CHARLES SCHOLL.

SHERIFF,
JAMES P. WATSON.

LIBRARIAN,
JAMES M. CROPSEY.

RULES

OF THE

SUPREME COURT OF INDIANA.

PARTIES.—PROCESS.

RULE 1.—The assignment of errors shall contain the full names of the parties, and process when necessary shall issue accordingly.

APPEARANCES.

RULE 2.—Appearances to suits in this court shall be entered in the clerk's office, in writing.

RULE 3.—A joinder in error, or the filing of an answer by the party in person or by his attorney, or an agreement in writing to submit, filed in the clerk's office or indorsed upon the record, shall be deemed an appearance within the above rule.

MOTIONS AND SUBMISSIONS.

RULE 4.—Motions are to be made immediately after the orders of the preceding day are read, and the opinions of the court of the current day are delivered, and at no other time, unless in cases of necessity or in relation to a cause called in course.

RULE 5.—Motions are to be made by counsel in the order in which their names stand on the record, but no one is to make more than one motion until all others have had an opportunity.

RULE 6.—When a motion is founded on a matter of fact, which is not admitted or apparent on the record, it must be supported by affidavit.

RULE 7.—All motions shall be reduced to writing, embracing a brief statement of the ground and object thereof.

RULE 8.—Oral argument on motions and collateral questions will not be heard without special leave; but parties may file written briefs.

RULE 9.—On Wednesday of the first week of the term, the docket will be called for the submission of causes or other steps to be taken therein; and, upon such call, causes ready for submission may be submitted by the parties or either of them. The docket will not remain longer on call unless by order of the court. On the call of a cause ready for submission, if the appellant does not appear, the appellee may submit the cause or have it dismissed.

RULE 10.—A cause can only be submitted on call, as contemplated by the preceding rule, or by agreement of the parties filed with the clerk or indorsed upon the record.

CRIMINAL CAUSES.

RULE 11.—In criminal causes, the appellant may submit, immediately upon filing the transcript and proof of notice of appeal, as provided for in section 152 of the criminal code, or on the appearance of the opposite party, in any of the modes specified in Rule 3.

RULE 12.—In such causes, the prosecuting attorney who prosecuted the action in the court below, or the attorney general, may appear on behalf of the State, and file briefs.

DISMISSAL OF CAUSES.

RULE 13.—Where a cause appealed in vacation below is called, which was docketed ninety days or more before the term, and there is no appearance for the appellee, and no steps have been taken to bring him into court, it shall be dismissed. When a cause has been on the docket two terms without being submitted, it will be dismissed on call of the docket at the third term, unless good cause be shown why it shall remain on the docket.

BRIEFS.

RULE 14.—Where a cause is submitted on call or by agreement, the appellant shall have sixty days in which to file a brief, and if not filed within the time limited, the clerk shall enter an order dismissing the appeal, unless the appellee shall have filed with the clerk a written request that the cause be passed upon by the court. If cross errors are assigned, the party assigning them shall have the same length of time to file a brief therein, and if not filed within the time, the cross errors shall be struck out.

RULE 15.—All briefs shall be printed or legibly written; otherwise they will be ordered to be copied by the clerk of this court, at the cost of the party filing the same, as provided for by statute.

RULE 16.—The appellee may file a brief at any time before the cause is taken up for consideration; and this rule shall apply to the appellant as to assignment of cross errors. An application for a supersedeas must be accompanied by a brief referring to the record by pages and lines and pointing out the error or errors upon which the appellant relies.

RULE 17.—In all cases it shall be the duty of the clerk, where briefs are filed, to place the same with the transcript, and to note thereon the fact and time of filing the same and the party by whom filed.

RULE 18.—Attorneys upon opposite sides will be required, upon request, to interchange briefs.

RULE 19.—The appellant shall cause the transcript to be paged and the lines of each page to be numbered. He shall also cause marginal notes to be placed on the transcript in their appropriate places, indicating the several parts of the pleadings in the cause, the exhibits, if any, orders of the court, and the bills of exceptions; also, where the evidence is set out by deposition or otherwise, the names of the witnesses. The appellant, as also the appellee, where he shall assign cross errors, shall, in his brief, refer specifically to the record by page and line for any and every matter relied upon by him as error.

DISTRIBUTION AND DECISION OF CAUSES.

RULE 20.—After the causes are ready for distribution, and from time to time

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as they may be reached for consideration by the court, the court will distribute the records, in the order of submission, to the several judges in regular rotation, for examination and presentation to the court. A record will be kept, by the court, of the distribution thus made. No cause will be decided by less than a quorum; nor will any opinion speaking for all or a majority of the court be filed, until it shall have been read in the hearing of, and approved by, the court or a majority thereof.

CLERK'S DUTIES.

RULE 21.—The clerk shall enter upon the court docket, in a proper column, the fact, where such is the case, that the appeal was taken in term and duly perfected by filing the record within the time limited. When the appeal is not taken as above, the clerk shall note the date of the service of process or last publication of notice. If process has not been served, or notice given, the fact shall be noted.

APPEALS, ETC.

RULE 22.—Where an appeal is taken in term, as provided for in section 555 of the code, and the transcript is not filed in the office of the clerk of this court within the time limited by that section, the appeal so taken shall be deemed to have been abandoned; and if a transcript be afterward filed, an appeal shall be considered as taken by the filing of the transcript, as provided for in the next following section of the code, and the appellee in such case shall not be regarded as in court, without notice or voluntary appearance.

RULE 23.—Where an appeal is taken after the close of the term, by notice below as provided for by the first branch of section 556 of the code, the transcript must be filed within sixty days from the time of taking the appeal; otherwise the appeal so taken will be deemed to have been abandoned; and if a transcript be afterward filed, an appeal shall be considered as taken by the filing of the transcript, as specified in the foregoing rule, and the appellee shall not be regarded as in court, without further notice or voluntary appearance.

REHEARING.

RULE 24.—Rehearing must be applied for by petition in writing, setting forth the causes for which the judgment is supposed to be erroneous. The court will consider the petition without oral argument, unless otherwise directed by the court.

OPINIONS, WHEN TO BE CERTIFIED.

RULE 25.—Opinions and judgments shall not be certified to the court below by the clerk of this court, except in criminal cases, until the expiration of sixty days, unless by order of this court or on the filing of a waiver of a petition for rehearing, which order of court or filing of waiver shall be certified by the clerk, with the opinion.

SUPREME COURT REPORTER.

RULE 26.—The opinions of this court shall not be delivered to the reporter until the expiration of sixty days from the determination of the cause, unless certified as provided in Rule 25; and in cases where petitions for rehearing are filed, the opinions therein shall not be delivered to the reporter until such petitions are overruled.

x RULES OF THE SUPREME COURT.

WITHDRAWAL OF PAPERS AFTER DISMISSAL.

RULE 27.—When an appeal shall have been dismissed, the transcript of the record of the court below shall not be withdrawn from the files of this court, to be used in another appeal, or for any other purpose, without special leave of the court in term or of a judge thereof in vacation, and only on good cause shown by affidavit.

SUPREME COURT LIBRARY.

RULE 28.—No book belonging to the Law Library shall be removed from the library room, except to be taken for the purpose of oral argument into the court or consultation room, when it shall be delivered to the court or returned to the library. Any violation of this rule will be treated as a contempt of court.

ORDER OF HEARING CAUSES.

RULE 29.—Inasmuch as it is impracticable to hear causes in ^{the} ~~the~~ order in which transcripts are filed, in accordance with section 584 of the code, for the reason that they are usually submitted in a different order, and this being good cause shown for a different mode of hearing, it is ordered that causes be heard and determined, as nearly as may be, in the order in which they are submitted.

ORAL ARGUMENTS.

RULE 30.—In important cases, the court will hear oral arguments if desired by either party, and will, upon application, fix a time for the same.

NON-RESIDENT APPELLANTS.

RULE 31.—Whenever it shall be made to appear by the transcript or papers in the cause, or by affidavit filed at any time before the submission of a cause, that the appellant or appellants is or are non-residents of the State, security for costs will be required of such appellant or appellants. The security shall be taken on the terms, in the form, and with the force provided for in section 402, p. 228, 2 G. & H. If the party or his attorney be not present in court, notice of the requirement will be given by the clerk to the party or his attorney; and if the security shall not be given within the time limited by the court, the appeal will be dismissed.

APPEALS IN HABEAS CORPUS CASES.

RULE 32.—On appeal in a case of habeas corpus, either party may submit on motion at any time after the appeal is perfected, having given the opposite party, or his attorney, and any other person or persons having an adverse interest in the cause, three days' previous notice of the intended motion to submit. The notice (a copy of which has been served) with the sheriff's return thereon, or, where the notice has been served by any other person than the sheriff, the notice, with the acknowledgment of the service thereof, or an affidavit stating the time and manner of service, shall be filed with the clerk of this court, before the motion to submit shall be made. Such causes may also be submitted by agreement or on call, as other cases.

USE OF PAPERS IN CASES PENDING.

RULE 33.—In any case pending in this court and not distributed, any attorney or firm of attorneys representing either party may be allowed to take the record and papers out of the clerk's office for any proper purpose connected with such cause, on giving a receipt therefor in such form as the clerk may adopt, in

RULES OF THE SUPREME COURT. xi

which shall be specified the time during which such record and papers may be kept. On failure to return such record and papers within the time stated, the attorney or firm of attorneys so failing shall receive no other record or papers while so in default, and the clerk shall immediately issue an order against him or them to show cause why such record and papers have not been returned. On failure to show sufficient cause and return such record and papers, such attorney or attorneys shall pay the costs of the order and service thereof, and an attachment may issue as for a contempt.

RULE 34.—After a case has been decided, neither the record nor the opinion shall be taken from the office of the clerk, except by a judge of the court or by the official reporter; and the clerk is required to enforce this rule.

RULE 35.—When an appeal has been taken by a part of several co-parties, as authorized by section 551, 2 G. & H. 270, notice to the other co-parties, when non-residents of the State, may be given by publication, as provided in section 557, 2 G. & H. 272, in case of non-resident appellees, and a copy of such notice with the proof of its publication shall be filed with the clerk.

For previous decisions of the Supreme Court of this State, overruled, criticised, explained, or doubted, see INDEX, tit. CASES OVERRULED, etc.

Gavin & Hord's Statutes of Indiana cited as 1, 2 G. & H. Statutes of Indiana, Vol. 3 (Davis' Supplement), cited as 3 Ind. Stat.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, MAY TERM, 1873, IN THE FIFTY-SEVENTH
YEAR OF THE STATE.

RABB ET AL. v. GRAHAM ET AL.

SUPREME COURT.—*Notice of Appeal.*—Where some of the defendants in a judgment appealed to the Supreme Court, without causing notice of the appeal to be served on their co-defendants, as required by section 551 of the code, the appellants, in the assignment of error, making said co-defendants appellees, with the plaintiffs, and alleging that said co-defendants refused to join in the appeal, the court, of its own motion, set aside the submission and continued the cause for further process.

WILL.—*Undue Influence.*—Advice, persuasion, or entreaty does not constitute undue influence. The influence that will vitiate a will must be such as in some degree to destroy the free agency of the testator and constrain him to do what is against his will, but what he is unable to refuse or too weak to resist.

SAME.—*Power of Disposition by Will.*—A father may by his will give his property to some of his children, to the exclusion of others, and he may give it to an entire stranger, to the exclusion of his children; and it must, as a general rule, be left to him to determine the sufficiency of the reasons for so doing.

SUPREME COURT.—*Parties.*—*Notice.*—Under section 551, 2 G. & H. 270, it is the correct practice to unite with those who appeal their co-parties who do not appeal, in taking the appeal and in assigning the errors; those who appeal must then serve notice on those who do not, and file the proof thereof with

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the clerk. Unless the co-parties thus notified appear and decline to join in the appeal, they will be regarded as having joined, and will be liable for their due proportion of the costs. If they decline to join, their names may be struck out of the assignment of errors on motion, and they can not take an appeal afterward, or derive any benefit from the appeal, unless from the necessity of the case, or unless they are under legal disabilities.

From the Montgomery Common Pleas.

J. H. Brown, J. M. Butler, G. McWilliams, S. F. Wood,
and *H. H. Stilwell*, for appellants.

T. F. Davidson, for appellees.

DOWNEY, J.—This was an action commenced by Harriet Graham and others, against the appellants and Rhoda Ann Rabb, Mary Benner, Daniel Benner, Olive Davidson, Edward Davidson, Charles Rabb, Frank Rabb, Garrett Rabb, Webb Rabb, and Grace Rabb, to contest and set aside the last will and testament of Johnson Rabb, deceased. The parties are the children and grandchildren of the deceased. Issues were formed, and a trial by jury resulted in a verdict against the validity of the will, on which, after a motion for a new trial had been made and overruled, there was judgment setting aside the will, and for costs against all the defendants. The clerk's entry shows that the defendants prayed an appeal, which was granted on filing bond in a designated amount, with certain designated persons as security, within sixty days, from the date of the judgment, which was at the May term, 1870. This appeal was not perfected, but on the 19th day of January, 1871, a transcript was filed in this court, and errors assigned thereon by John Rabb, Smith Rabb, Levi Rabb, and Franklin Rabb, against Harriet Graham, Ferguson Graham, Margaret Sharon, John H. Sharon, Ancher Dunkerly, William Dunkerly, Rhoda Ann Rabb, Mary Benner, Daniel Benner, Olive Davidson, Edward Davidson, Charles Rabb, Frank Rabb, Garrett Rabb, Webb Rabb, and Grace Rabb, alleging that the appellees who were defendants below, refusing to join in the appeal, are made appellees by the appellants. A summons or notice seems to have been taken out against, and is returned served on, the

persons who were plaintiffs below, but no notice appears to have been served on the persons who were made appellees who were defendants below, as is imperatively required by 2 G. & H. 270, sec. 551. In this condition of the case we feel it to be our duty, although our attention is not called to the matter by counsel, to refuse to proceed in the case.

The submission is set aside, that there may be further process.

ON RESUBMISSION.

DOWNEY, J.—This was an action by the appellees against the appellants to contest the will of Johnson Rabb, deceased, and to set aside the probate thereof. The objections urged against the will are :

1. That the deceased, at the time of making it, was of unsound mind.

2. That he was, at the time, under improper restraint and influence of the defendants, John Rabb, Levi Rabb, Smith Rabb, and Franklin Rabb.

3. That, at the time, he was under the influence and control of the last named defendants, and that the execution of the will was procured by their undue influence, and control.

4. That its execution was procured by and through the deceit, fraud, improper influence, and duress practised and imposed upon the testator by said last named defendants.

A copy of the will and the probate thereof is made part of the complaint.

There was an issue of fact formed by a general denial, which was tried by a jury, and resulted in a verdict against the validity of the will. A motion for a new trial, assigning thirteen reasons therefor, was made by the defendants and overruled by the court. Final judgment was rendered for the plaintiffs. The error assigned is the overruling of the motion for a new trial.

We shall examine such of the questions presented by the motion for a new trial as are necessary to the decision of the

case, except that, as we understand the record, the ground relied upon for setting aside the will, relating to the unsoundness of mind of the deceased, was expressly abandoned on the trial, and therefore we need not decide any question which relates exclusively to that ground.

The deceased was the owner of both real and personal estate. The will is attested by George H. McNeil, John Dunlap, and Thomas H. Smith. William Conover was appointed executor, and John Rabb in case of the decease of Conover.

By his will the deceased directed that his debts and funeral expenses be paid out of his personal estate. His real estate, valued at eight or ten thousand dollars, he devised to his four sons, John, Smith, Levi, and Franklin Rabb. To his daughter, Mary Benner, and his daughter-in-law, Rhoda Ann Rabb, widow of a deceased son, he gave five hundred dollars each, which amounts were to be paid by the sons, and were charged upon the lands devised to them. To his son, Franklin Rabb, he bequeathed all the personal estate. To his daughters, Harriet Graham and Margaret Sharon, and his granddaughter, Ancher Dunkerly, he gave no part of his estate. The disinherited daughters and granddaughter, with their husbands, are the parties contesting the will. The personal estate, according to the inventory, which was in evidence, amounted to about one thousand and fifty dollars. What the funeral expenses and debts of the deceased amounted to does not appear.

The undue influence is charged to have been exercised by the sons of the deceased, the principal devisees. As one of the reasons for a new trial was the insufficiency of the evidence to justify the verdict, it is necessary that we should go through the bill of exceptions and ascertain what the evidence was, which was given to show the existence and exercise of undue influence, as well as that tending to show a cause for the exclusion of the two daughters and the granddaughter from any participation in the estate.

Shortly before the death of the wife of the deceased, he

and she broke up house-keeping, and resided for a time with different ones of their children, and afterward they made their home at the old homestead with Franklin Rabb, where they continued to live until their decease. He was to keep them and pay the taxes for the use of the farm. The deceased was occasionally away from the house of Franklin after the death of his wife, for a short time, at the house of his other sons. The will was made on the sixth day of June, 1868. The deceased died in that year, when he was seventy-seven or seventy-eight years of age. For a year or two before his decease he was in bad health, having dyspepsia and chronic diarrhoea. But he was able to go about until a short time before his decease. It was proved that the deceased had often expressed himself in favor of an equal division of property of parents among their children. He was a man of decided convictions and a strong will. Before the death of his wife, it appears that there were some difficulties about the property. One of the witnesses for the plaintiffs, Luke Dunkerly, testified: "Before the old lady died, there was a disturbance at the house, and after that Johnson Rabb would not talk with me." Andrew Ainsworth, another witness of the plaintiff, testified as follows: "John Rabb told me before the old lady's death that the girls had pretty much stripped the house; the girls are taking things from the house, and they had better wait until the old people are dead."

A difficulty which occurred between Mrs. Sharon, and Mrs. Graham, two of the daughters, and Franklin Rabb, in March, 1868, at which Sarah D. Hutchins was present, is regarded as an important element or circumstance in the case. Mrs. Sharon says that she and her sister, Mrs. Graham, went to the house to see their mother, who was sick; that she was not able to get out of bed. There were at home Franklin Rabb's wife, the hired girl, Sarah D. Hutchins, and her mother; that when they went in no one spoke. She went to where her mother was in another room, and after a while Franklin came in and told them to go out. She said to him

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that they had as good a right there as he had. "He said Mrs. Graham had called his wife a hard name, and he wanted us to leave. He said he would go after father. I said to him to go, I wanted to see father any how, and he then started after father, who was at John Rabb's. Afterward father and Franklin came back. Father cursed and swore, and was very mad. We tried to reason with him, but he would not listen to us. I asked father why he allowed Franklin to act that way, and he said he was only a boarder with Frank, and Frank had control there, and that Frank said we were there making a fuss with his wife. The old lady told Frank to go out of the house, and Frank said he had heard of our coming and intended to order us off." Mrs. Sharon did not go to the house on the occasion of her mother's funeral, went to the place of burial, but did not speak to her father. She did not go to see her father after her mother's death. Frank went after his father on the occasion of the difficulty, on horseback. Frank's wife was cleaning house. She does not know what bitter things she has said about Frank's wife. Mrs. Graham says she and Mrs. Sharon were with their mother, and Franklin came in and ordered them out, "and said he would go and bring father. Father came and said Frank owned everything, and he was but a boarder." When Frank first came in and began to talk to them, his mother spoke to him, and he shook his fist under her nose and told her to keep herself quiet. "The old man, when he came, cursed and swore, and ordered us out of the house. My mother died in May, 1868, and I had no notice of her coming death. After she was dead, Conover came and told me when the funeral would take place. I was at the graveyard when mother was buried. My brothers, Smith, John, Franklin, and Levi, were there. I did not see the old man after our visit to mother." She testified, that when Frank told her and Mrs. Sharon to leave, he said she had called his wife a b—ch. She denied that she had used the word.

Sarah D. Hutchins testified, that she was at the house of Frank Rabb, when Mrs. Sharon and Mrs. Graham came

there ; that Frank came in after they had been there a while, and told them that they had called his wife a b—ch, and that they must leave. They said he had no right to order them away ; he said he would go and get his father, and went and got a horse and went away. When he returned his father came on horseback and Frank walked. “When the old man came in he asked what the fuss was about. Mrs. Sharon said they had not raised a fuss. He did not say anything about being dissatisfied about their being there. He said he had given up everything to Frank ; that he was only a boarder. Nothing was said between the women before Frank first came in, except that Frank’s wife called Mrs. Graham a b—ch. Heard Frank say to the old man that he ought to make a will and give his property to the boys, and not leave the girls anything. The old man said he would as soon as he could get his buggy home. This talk was at the breakfast table, about a week after the trouble between Frank and Mrs. Graham and Mrs. Sharon.” This witness was seriously impeached by proof of contradictory statements made out of court, the foundation for which was laid by putting the proper preliminary questions to her.

Nelson Crane testified, that John Rabb stated after the above named difficulty, “there will be a will made now.” Mrs. Crane, on behalf of the defendants, testified, that Sarah D. Hutchins told her within a day or two after the trouble at Frank Rabb’s, that the fuss was begun by Harriet Graham going to the door of the room where Mrs. Frank Rabb was, and that when Mrs. Frank Rabb looked up, Mrs. Graham said to her, “It is not you I am looking for, you b—ch.”

Mrs. Elizabeth Crane testified, that Sarah D. Hutchins related to her the origin of the difficulty in the same way. John Rabb testified to the same, and also that Frank went to live on the homestead with his father upon the advice and at the request of himself and Levi, after Mrs. Graham had declined to go. He also testified, that he never used any persuasion or any inducement of any kind, or any influence

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to induce his father to make a will. His father had told him that he would make a will, directly after the fuss and before his mother's death.

Sarah Conover testified, that she saw Ancher Dunkerly riding by the house of the deceased, with her husband, on the day of the funeral of the wife of the deceased; that they went by fast; that the deceased saw them as they went by, and said: "It would have been for Ancher's own good if she had come in. I'll fix my property, if I can, so that the girls won't get any of it."

Levi Rabb testified, that he used no influence to get his father to make a will. He heard him say he intended to make a will.

Frank Rabb testified as follows: "I was out at the sugar camp and came home. When I got there, I heard mother crying. I came into the house. Mrs. Sharon ordered me out of the house, and told me that there was law for me. I went over to John Rabb's and got father, and he rode the horse back over the road, and I went home across the fields. When I got home, a boy was holding the horse. I never heard father say anything about making a will. I did not know about the will until after father's death. I never had any such conversation as testified to by Sarah D. Hutchins. Father controlled the farm and directed when to put in grain. I moved into the homestead in 1867, at the request of father, and John, and Levi. I told Mrs. Sharon, if she could not behave herself to go home."

Smith Rabb testified that he never had any conversation with his father about a will before or after it was made. On the day he made the will, he requested witness to get some one to write it. He was then at witness's house, at Perrysville, and said he would make his will and go home the next day. Witness told McNeil what his father wanted, and afterward, at his request, got witnesses to attest the will. Did not know of the contents of the will until after his father's death.

George McNeil, who wrote the will, and whose testi-

mony is quite full, testified as follows, omitting some immaterial parts: "I wrote this will on the 6th day of June, 1868. In the morning, some one, I think it was Smith Rabb, came to my store, and told me that the old gentleman, Johnson Rabb, wished to see me up at Smith Rabb's house; that he wanted me to do some writing for him. As soon as I could leave the store, I went up to Smith Rabb's house. Smith Rabb lives about two squares from my store. I went into the house and found Johnson Rabb in the east room. He was alone. I bid him the time of day, and sat and chatted with him for a little while. Pretty soon he told me he had sent for me and wished me to write a will for him. He said he had previously not intended to make a will, but that circumstances had transpired in his family which wounded, grieved, or hurt him very much (my best impression is that he used the word hurt), and that he had changed his intention and wished to make a will. He went on to say that he could go on and give me a detailed statement of the circumstances, if necessary, but that he did not think it necessary for the present purpose. I then asked him to give me a memorandum or statement of the way he wanted his will made. He then went on to give me the statement of his property, gave me the quantity of his real estate, said he had some money out, some notes and accounts, some threshed wheat and personal property on the farm. He then went on to tell me how he wanted the bequests made. He suggested that the lien for the legacies to Mary Benner and Rhoda Ann Rabb should rest on the land until paid, and that these legacies should not be paid out of the personal property. I made a memorandum as he told it over to me, and after he got through I had him to restate it all again, to see if I had it right. He related it all over again, just as he had before, and just as it is in the will. I then took the memorandum and went to my store, and along as I had leisure, I wrote out the will. After dinner I took the will up to the house, and found Johnson Rabb in the same room he was in in the morn-

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ing. He was alone. I read the will all over to him carefully, and then re-read it, I think; at least that is my custom, and I am quite confident that I read it to him a second time. He said it was all just as he wanted it to be, and requested me to go and bring some witnesses to witness the will. I left the will with him and went down in town to get some witnesses. As I passed by Smith Rabb's store, I told him to get some good men; think I suggested to him Thomas Smith, and think I myself spoke to Dunlap to be one of the witnesses. The old gentleman selected Capt. Conover as executor, and in case of his death, John Rabb. Mr. Dunlap, T. H. Smith, and myself went up to the house, and the old gentleman in our presence signed the will and had us witness it. The will was not read over in the presence of the witnesses, but Johnson Rabb stated that it was his will, and that he wanted them to witness it, that he understood it perfectly, and that it was right. After the will was executed and witnessed, I handed it back to Johnson Rabb. He took it and said he would keep it in his possession until he could put it in the hands of Captain Conover. I thought he was fully capable of doing business. I could perceive no abatement of his mental force and vigor. He was not, perhaps, quite so quick, but as correct as ever. He was a man of more than ordinary intelligence, not highly educated, but a man of strong mind. He was a man of strong will and firm purpose. I could discover no influence or restraint whatever exerted over him to induce him to make the will. He was perfectly free to go and come when and where he pleased. None of the Rabb boys were in town that day that I know of except Smith, and he was down at his store at each time I was at the house. No one was present at my first two visits to the house, and no one except the witnesses to the will the last time, except, perhaps, one of Smith Rabb's girls came to the door once. No secrecy was enjoined as to the will.

"Smith Rabb asked me to go and see the old gentleman; said he had sent for me. The old gentleman was then an

inmate of Smith Rabb's family. I had seen him there frequently. I think it was the circumstances which he said hurt him that induced him to make the will. The old man, in the presence of Dunlap and Smith, said that he fully understood the will and wanted them to sign it as witnesses. I mean that if there was any influence or restraint there operating upon him, he was perfectly able to get up and go away from it. There was no physical restraint of any kind whatever. The old gentleman was perfectly free to go and come when and where he pleased. I think he went home the next day after the will was made. I know nothing of any antecedent agencies brought to bear upon him to make a will."

Mrs. Graham was recalled and testified that Mrs. Sharon did not order Franklin out of the house, and it was admitted that Mrs. Sharon, if present, would testify to the same thing.

This is all the evidence which tends to the proof of the allegations in the complaint, other than that relating to the unsoundness of mind of the testator. We may say that after a careful reading of the evidence with reference to the unsoundness of mind of the deceased, we think it wholly fails to establish the fact. The question then is, does the evidence which we have set out show that the execution of the will was procured by the means stated in the complaint? We are of the opinion that it does not. Undue influence exercised by the sons, and especially by Franklin, is relied upon. We see no evidence of it. If he said, as testified to by the impeached witness, Sarah D. Hutchins, to his father, which he positively denies, that "he ought to make a will and give his property to the boys, and not leave the girls anything," this was far from undue influence, and was not complied with by the father, for he did bequeath to two of the girls a part of his estate. If it is supposed that he may have unduly influenced his father by what he said to him when he went after him to John Rabb's at the time of the difficulty and the calling of bad names, it is enough

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to say that there is no evidence of any such thing, not even of the speaking of a single word to him on the subject. Advice, persuasion, or entreaty does not constitute undue influence. "The amount of undue influence which will be sufficient to invalidate a will must, of course, vary with the strength or weakness of the mind of the testator. The influence which would subdue and control a mind naturally weak, or one which had become impaired by age, sickness, disease, intemperance, or any other cause, might have no effect to overcome or mislead one naturally strong and unimpaired. But in every case the influence that will vitiate a will must be such as, in some degree, to destroy the free agency of the testator and constrain him to do what is against his will, but what he is unable to refuse, or too weak to resist." 1 Jarman Wills, 37, *et seq.*; *Kenworthy v. Williams*, 5 Ind. 375; *Noble v. Enos*, 19 Ind. 72.

With reference to the difficulty at Franklin Rabb's, it may be said that the father had full opportunity to enquire into it and learn its exact character, and it may be presumed that he did so inquire. If he ascertained the fact to be that the daughters came to the house only two weeks before their mother's death, and got up the difficulty which ensued; if they followed it up by unkindness to their father, refusing to go to the house and join in the burial rites of their mother; and if, though they were at the grave, they refused to associate with or speak to their father, it is not for us to say that his will, in which he disinherits them, shall not stand. We think that all the evidence in the case points to this difficulty and the subsequent deportment of the daughters as the causes for their exclusion from any participation in the estate.

As to Ancher Dunkerly, she was a granddaughter of the deceased, had been taken into his family at the death of her parents, in her infancy and helplessness, and reared and provided for by him and his wife. Under these circumstances, it might be supposed that she would have hastened to her aged and bereaved grandfather, and united in paying the

respect to the deceased which the ties of kindred and the obligations of gratitude required. There had been no previous difficulty, so far as she and her husband were concerned. But this she did not do; but, on the contrary, according to the evidence, passed by the house rapidly on the day of the funeral, not deigning even to stop. What wonder if such ingratitude should pierce the old man's heart, and cause him then and there to resolve that it should receive its proper reward! A father may, by his will, give his property to some of his children, to the exclusion of others, and he may give it to an entire stranger, to the exclusion of his children; and it must, as a general rule, be left to him to determine the sufficiency of the reasons for so doing.

There are other questions in the record which we would have to consider before we could affirm the judgment, if the evidence was regarded as sufficient. But as we think the evidence is insufficient, we need not examine them.

The judgment is reversed with costs, and the cause remanded, with instructions to grant a new trial.

ON PETITION FOR A REHEARING.

DOWNEY, J.—A petition for a rehearing has been filed in this case in which we are asked to review our decision upon the point decided in the case; and we are asked to grant a rehearing on two grounds not mentioned in the opinion, but which were necessarily decided in arriving at the conclusion stated in the opinion. Upon the question as to whether the evidence established any of the alleged causes for contesting the will, we see no reason to change the decision announced in the opinion.

It was claimed in the brief of counsel for the appellees, that the bill of exceptions setting out the evidence was not properly in the record, because, as was insisted, the record did not show that it was filed within the time given by the court. This position was so clearly unsupported by the

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record that we supposed it unnecessary to speak of it in the opinion, and left it to be inferred that the objection was not allowed, by deciding the case as though the bill of exceptions was properly in the record. The facts are, as shown by the record, that time was given by the court to the defendants, on overruling the motion for a new trial, "until the 3d day of August, 1870, in which to complete and file their bill of exceptions to the rulings of the court in said cause." In the record immediately preceding the copy of the bill of exceptions containing the evidence, and evidently relating to the time of its filing, are these words: "Filed June 17th, 1870, Wm. K. Wallace, Clk." At the conclusion of the bill of exceptions, preceding the signature of the judge is this statement:

"And to the overruling of which motion by the court, the defendants, at the time, excepted, and tender this, their bill of exceptions, and pray that the same may be signed and sealed by the court, — day of June, 1870." Counsel now insist that the bill of exceptions "does not show a signing in time; that it only shows that the judge was asked to sign it on the — day of June, 1870. Whether then signed or not, does not appear." We think the learned counsel would have us indulge too much skepticism upon this point. The bill of exceptions was certainly signed before it was marked filed by the clerk on the 17th of June, 1870, which was within the time limited.

The other point made, which is not referred to in the opinion, grows out of these facts. In the assignment of errors in this court, John Rabb, Smith Rabb, Levi Rabb, and Franklin Rabb, are named as appellants, and Harriet Graham, Ferguson Graham, Margaret Sharon, John H. Sharon, Ancher Dunkerly, William Dunkerly, Rhoda Ann Rabb, Mary Benner, David Benner, Olive Davidson, Edward Davidson, Charles Rabb, Frank Rabb, Garrett Rabb, Webb Rabb, and Jane Rabb, are made appellees, it being stated that "the said appellees who were defendants below, refus-

ing to join in the appeal, are made appellees by the appellants." The appeal was submitted in this shape, without any objection from any one. But when we came to decide the case, we found that process had been served on the appellees who were plaintiffs below, but never had been served on the appellees who were defendants below, but who had not joined in the appeal. Not thinking it proper to dispose of the case until all those who were to be affected by the decision had been notified, the court, of its own motion, set aside the submission, that there might be process served on the other appellees. This was done on the 30th of May, 1872. Afterward new process was issued and served on some of those who had not been served, and as to the others the counsel of the appellees entered their appearance, in writing, in the clerk's office, stating that they declined to join in the appeal, no objection being made that they should have been named as appellants. The cause was then again submitted, on the 27th of November, 1872, by agreement. On the 16th day of December, 1872, a written request was made by counsel for appellants, that the cause be placed in the order on the docket in which it stood at the time of the previous submission, in order to obtain an early decision. Counsel for appellees joined in this request in this form. "I join in the above petition to the court, and add that the submission was probably set aside under a misapprehension of the condition of the record as to the necessary parties. The parties for whom summons was ordered were, with one exception, not parties to the suit, though named in the complaint. They were not necessary parties, and were not such in fact. As to the exception, an appearance is entered upon the record. The parties were simply named as being heirs. It was not necessary, under the statute, to make them parties. Sec. 39, p. 559, 2 G. & H. Under this section, any one of the parties may contest, and the executor and other persons beneficially interested only are to be defendants. These were the only defendants. I think it would be but

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simple justice to reinstate the cause, and earnestly ask that it be done. The estate is suffering from delay.

“THOS. F. DAVIDSON, for appellees.”

On the fly-leaf of one of the printed copies of the appellees' brief, there is this statement, in pencil, without date: “I desire to call the attention of the court to the fact that the parties not joining in the appeal have not yet been properly made parties here. The submission has once been set aside for this reason, and I now ask that the appeal be dismissed for this cause. To dismiss is the practice of the court.

THOS. F. DAVIDSON.”

The cause was not advanced as requested, but was decided at as early a day as the other business of the court would allow, and the opinion was filed on the 15th day of September, 1873.

Counsel for appellees now urges in the petition for a rehearing, that “the court ought not to have considered the case at all over the objection of appellees, because there has never been a valid assignment of errors. All the appellees, except Mrs. Sharon, Mrs. Graham, Mrs. Dunkerly, and their husbands, should have been appellants, and the assignment fails to show why they are made parties at all. This objection was insisted on by appellees, and has apparently not been noticed by the court.” We think it must be evident from this statement of the facts, not only that the objection now urged was never made before, but that it was expressly waived by the counsel now urging it. The parties affected by the decision were all duly notified of the appeal, and we think it is now too late, under the circumstances of this case, to urge an objection that some of them were named as appellees, when they should have been named as appellants. Under section 551, 2 G. & H. 270, it is the correct practice to unite those who do not appeal with those who appeal, in taking the appeal and in assigning the errors; those who appeal must then serve notice on those who do not, and file the proof thereof with the clerk of this court. Then, unless the parties thus noti-

fied appear and decline to join in the appeal, they shall be regarded as having joined, and shall be liable for their due proportion of the costs. If they decline to join, their names may be stricken out on motion, and they shall not take an appeal afterward, nor shall they derive any benefit from the appeal, unless from the necessity of the case, except persons under legal disabilities. When the section in question says the names of those who decline to join in the appeal may be stricken out on motion, it must mean, we presume, that their names are to be stricken out of the assignment of errors, which is the foundation of the proceeding in this court; and unless their names had been first inserted in the assignment of errors, there would be no propriety in saying that they should be stricken out. Several appeals have been dismissed for non-compliance with this section, when they were taken by part only of the co-parties, and there had been no compliance with the requirements of the section, and when there had been no waiver of the objection. The reason why the appeal in this case was not dismissed on the first hearing of it was, that all the parties had been mentioned in the assignment of errors as parties in this court, on one side or the other, and the only question then was, that process had not been fully served on the parties named as appellees. We are referred to the case of *Aylesworth v. Milford*, 38 Ind. 226; and we are asked to examine the record in that case, and are assured that it is, on this point, like the case under consideration. We have made this examination and find the facts to be, that the judgment in the common pleas was rendered against Aylesworth and McElroy; Aylesworth alone appealed, but he made McElroy an appellee with Milford, the plaintiff below, and he was notified to appear in this court as an appellee, "and defend said appeal," etc. This was not regarded as a compliance with said section, and the appeal was for that cause dismissed by the court. There are two important particulars, at least, in which these cases differ. In the case we are

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considering, the assignment of errors shows that those named as appellees, who were defendants below, are made appellees because they refused to join in the appeal, while in the case cited, there was no such statement in the assignment of errors; and, second, there was, in that case, no waiver of the irregularities as there has been in this case. Had it not been made necessary to state the facts of the case as we have done, in disposing of the petition for a rehearing, we should not have regarded it as either useful or desirable to do so.

The petition for a rehearing is overruled.

SANDS v. THOMPSON.

STATUTE OF FRAUDS.—*Parol Agreement for Purchase of Real Estate.—Part Performance.*—Where A. and B. made a parol agreement with each other, that if B. would exchange certain of his real estate for certain real estate owned by C. and convey the real estate procured of C. to A., A. would pay to B. a certain price for the same;

Held, that the agreement was within the statute of frauds, and B. could not compel the performance of the contract by tendering a deed to A. for the real estate procured of C. and enforce the payment of the purchase-money.

Held, also (on petition for a rehearing), that the exchange by B. of his property for the real estate of C. was not a part performance of the contract between A. and B., so as to take the case out of the statute of frauds. *Eastburn v. Wheeler*, 23 Ind. 305, overruled.

From the Wayne Common Pleas.

W. A. Bickle, for appellant.

J. P. Siddall, for appellee.

WORDEN, J.—This was an action by the appellee against the appellant and three others. The complaint was as follows:

“William M. Thompson complains of Joseph Kelly, David Sands, George W. Barnes, and Edward W. Yarring-

43	18
145	204

43	18
156	508

ton, and says that on the 24th of August, 1869, Eunice Moffitt was the owner in fee of the following described real estate, to wit:” (Here follows a description of the land alleged to have been owned by Eunice Moffitt.) “That the defendants had entered into a partnership among themselves, for the purpose of buying, slaughtering, and packing hogs, and desired to have the above described property on which to erect buildings and carry on said business, and wished to purchase the same for that purpose, and were willing to pay therefor the sum of twenty-seven hundred dollars, being the value thereof; but they had doubts whether the said Eunice might not be dissuaded by the owners of adjacent property from selling said property to them to be used in the said business, if it were known that they desired to purchase it. Therefore it was agreed among the defendants, that they would procure the plaintiff to purchase said property for them, and, to avoid any suspicion as to their interest in the same, that he should have the conveyance made to himself, and should subsequently, on demand, convey the same to the defendants. The plaintiff was the owner in fee of lot 20 in Bickle and Law’s addition to the city of Richmond, Indiana, which, with the improvements thereon, was of the value of twenty-seven hundred dollars; and, further to avoid exciting any suspicion or inquiry as to the purpose of the plaintiff in buying said property, it was agreed between said defendants that the plaintiff should exchange his said property to the said Eunice for the property first above described, and that the defendants, on the completion of said exchange, would pay the plaintiff the sum of twenty-seven hundred dollars, for the conveyance of his property to the said Eunice. These propositions and agreements were communicated to the plaintiff by the defendants, and he agreed to the same, and in pursuance thereof conveyed his said property to said Eunice, and in exchange therefor received of said Eunice a conveyance of her said real estate; said conveyance being executed on August 24th, 1869. Thereupon the plaintiff demanded of defendants the said sum of twenty-

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seven hundred dollars, but the defendants declined to pay the same for the present, for the reasons following: It was proposed that said partnership be dissolved, said Sands and Kelly proposing to buy the packing and slaughtering house of James McWhinney; and Barnes and Yarrington being unwilling to do so, Sands and Kelly entered into a partnership with Benjamin L. Martin, and made the purchase of McWhinney, and they, not then needing the Moffitt property, proposed that Barnes and Yarrington take it, which they were unwilling to do, unless they could get up another satisfactory firm; and failing in their efforts to do this, they declined to take the whole of said property. The plaintiff was requested by defendants not to execute any deed until it was ascertained whether these arrangements would be consummated, and if they were, they wished him to make the deed to the new firm, who would pay for the property. The plaintiff complied with the request of the defendants and waited on their action until the 21st of March, 1870, when he executed and tendered a deed for said real estate first above described, to the defendants, and again demanded the twenty-seven hundred dollars, and the interest thereon due him, which deed is herewith filed for the use of the defendants, and marked 'Exhibit A.' The defendants declined to accept said deed or pay said twenty-seven hundred dollars, which sum, with interest thereon from August 24th, 1869, is due to plaintiff and remains wholly unpaid; wherefore," etc.

Yarrington's death was suggested pending the action. Barnes made default; Kelly and Sands demurred to the complaint for want of a statement of sufficient facts, but the demurrer was overruled, and they excepted. They then answered: 1. General denial. 2. That the contract was not reduced to writing. Demurrer to second paragraph sustained, and exception. Issue tried by the court; finding in favor of Kelly, but in favor of the plaintiff as against Sands. Motion by Sands for a new trial overruled, and exception. Final judgment for plaintiff against Sands and Barnes.

Barnes, in a note endorsed upon the transcript, declines to join in the appeal, and consents that his name be stricken from the record.

The first question that is presented by the record and assignment of error arises upon the ruling below in overruling the demurrer to the complaint.

If the contract set up therein is within the statute of frauds, and, therefore, not the foundation of an action unless reduced to writing, the complaint should have shown that it was thus reduced to writing. *Harper v. Miller*, 27 Ind. 277.

Our present statute provides, that "no action shall be brought * * * upon any contract for the sale of lands ; * * * unless the promise, contract or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized; excepting, however, leases not exceeding the term of three years." 1 G. & H. 348, sec. 1.

The substance of the agreement stated in the complaint, stripped of extraneous circumstances, is this: The defendants desiring to purchase the Moffitt property, for which they were willing to pay twenty-seven hundred dollars, and the plaintiff having property which he was willing to sell for that amount, it was agreed between the plaintiff and the defendants, that if the plaintiff would exchange his property for the Moffitt property and convey the latter to the defendants, they would pay him the twenty-seven hundred dollars.

This, as it appears to us, is clearly a "contract for the sale of lands," and furnishes no foundation for an action, not having been executed in the manner required by the statute. It is claimed by the counsel for the appellee that he was acting as the agent of the defendants throughout the transaction. We are not of that opinion. He seems to us to have been acting for himself and for his own benefit. It is difficult to see how he could have been acting as the agent of the defendants when making a contract with them on his own behalf. He seems to have been willing to aid the

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defendants in accomplishing their desire to acquire the Moffitt property, thereby effecting a sale of his own. If it was not commendable in the defendants to resort to the circuitous method adopted, of acquiring the Moffitt property, it was no more so in the plaintiff to aid them in doing so, though he thereby accomplished a purpose of his own. The circumstances, it would seem, should have suggested to the plaintiff the propriety of having his contract reduced to writing, in order that it might be enforced, if necessary, without any dispute as to its terms.

The case is not one where there has been a complete performance on one side. The defendants have not accepted the deed. Had they done so, they would, doubtless, have been liable. Says Mr. PARSONS: "When a contract, originally within this clause of the statute, has been executed, and nothing remains to be done but payment of the consideration, this may be recovered notwithstanding the statute. But in such case the declaration should be framed, not upon the original contract, but upon the contract implied by law from the plaintiff's performance." 3 Pars. Con., 5 ed., p. 35. See, also, *Fisher v. Wilson*, 18 Ind. 133; *Thomas v. Dickinson*, 12 N. Y. 364.

In the case last cited, JOHNSON, J., in delivering his opinion, says: "When, therefore, the last conveyance required by the contract was made, its execution and acceptance were equivalent to a re-adoption by the parties of the remaining unperformed terms of the original agreement. It thereby ceased to be a contract for the sale of lands or an interest in lands and became a mere agreement to pay for lands conveyed. As such it was not within the statute of frauds. A promise to pay for land conveyed is not within the statute and needs not to be in writing."

The plaintiff, to be sure, tendered a deed for the property which he was to procure from Eunice Moffitt and convey to the defendants, but such tender does not entitle him to enforce the contract. *Hadden v. Johnson*, 7 Ind. 394. It is

the acceptance of the deed, in such case, that lays the foundation for liability.

We are of opinion, therefore, that the court erred in overruling the demurrer to the complaint.

The judgment below, as to the appellant, is reversed, with costs, and the cause remanded.

ON PETITION FOR A REHEARING.

WORDEN, J.—The appellee has filed an earnest petition for a rehearing in this case, and we have again considered the question involved, with such care as, from its importance, it seemed to demand. He has cited, and relies upon, the case of *Eastburn v. Wheeler*, 23 Ind. 305, to show that the alleged acts of part performance take the case out of the statute of frauds. The case in 23 Ind., not having been cited in either of the original briefs of the parties, was overlooked by the court in the original consideration of the cause.

That case was as follows: A. filed a complaint against B. to foreclose a mortgage executed by the latter to the former. B. filed a cross complaint, alleging, in substance, that a third party was desirous of purchasing some real estate of him, but wished him to take in part payment therefor a lot in Lafayette at three hundred dollars, and had made him an offer accordingly. This B. declined, and thereupon A., who was informed of the facts, agreed with B. that if the latter would accept the offer thus made and take the Lafayette lot at the price named, he, A., would take the lot of B. at the same price, and credit B. with the amount on the mortgage. B., thereupon, accepted the offer that had been thus made to him by the third party, took a conveyance of the Lafayette lot, and tendered a deed therefor to A., and demanded the credit on the mortgage, which was refused. It was held that the alleged acts of part performance took the case out of the statute of frauds.

Without undertaking to determine whether the decision

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in the above case might not have been placed upon different ground, we may observe that it cannot, in our opinion, be upheld upon the ground upon which it is placed. We have examined the case of *Chambers v. Lecompte*, 9 Mo. 575, much like that of *Eastburn v. Wheeler*, and disapproved in the latter case, and it seems to us to have been correctly decided. The authors of *Leading Cases in Eq.*, vol. 1, p. 736, in speaking of the Missouri case, say: "There can be little doubt of the soundness of this decision, because to take a contract for the sale or conveyance of land out of the statute by performance, the performance must be on or about the land in question, and be so far founded upon the contract, that it would be wrongful had no contract been made. Hence, an oral agreement between the owners of two adjacent lots, that each will build upon the same line a certain number of feet back from the street, will not be rendered binding by the erection of a building on one of the lots, in compliance with the agreement, because this might obviously have been done, had no agreement been made, and consequently cannot show that an agreement exists." *Wolfe v. Frost*, 4 Sandf. Ch. 72.

In the case cited from Sandford, the court say: "In order to make the acts such as a court of equity will deem part performance of an agreement within the statute, it is essential that they should clearly appear to have been done solely with a view to the agreement being performed. If they are acts which might have been done with other views, they will not take the case out of the statute, since they cannot properly be said to be done by way of part performance of the agreement."

The tendency of modern decisions is to restrict the doctrine to the limits established, rather than to extend it. Thus, in the case of *Phillips v. Thompson*, 1 Johns. Ch. 131-46, it was said by KENT, Chancellor: "This case, like many others, shows the utility of the statute of frauds, and the danger of relaxing the sanction of its provisions. I agree with those wise and learned judges, who have declared

that the courts ought to make a stand against any further encroachment upon the statute, and not go one step beyond the rules and precedents already established."

We quote, on the subject of part performance, the following paragraph from Browne on the Statute of Frauds, secs. 455, 457:

"Vice-Chancellor Sir Lancelot SHADWELL says: 'It is in general of the essence of such an act that the court shall by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in if there were no contract. Of this a common example is the delivery of possession. One man, without being amenable to a charge of trespass, is found in the possession of another man's land. Such a state of things is considered as showing unequivocally that some contract has taken place between the litigant parties. And it has, therefore, on that specific ground been admitted to be an act of part performance. But 'an act which, though in truth done in pursuance of a contract, admits of explanation without supposing a contract, is not in general admitted to constitute an act of part performance to take the case out of the Statute of Frauds; as, for example, the payment of a sum of money, alleged to be purchase-money. The fraud, in a moral point of view, may be as great in one case as in the other, but in the latter case the court does not in general grant relief.'

"Another rule, and the last which seems to require notice as laid down upon this subject, is that the acts of part performance must have been done in execution of the contract, or, as Mr. Roberts well expresses it, 'must appear to be done with a direct view to perform the agreement, and tend inceptively toward its accomplishment.' This rule seems to be suggested by the very words, 'part performance;' and if it did not prevail, and any act, however disconnected with the agreement, which a plaintiff might proceed to do upon the faith of the agreement, were to be regarded as a reason for

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the interposition of equity, because prejudicial to him, known to the defendant, and incapable of adequate compensation in damages, the inconvenience would be serious and manifest. Great danger of fraud and perjury would be incurred in admitting proof that the plaintiff had in fact been induced by the agreement to do the acts relied upon; and, moreover, the important characteristic of an act of part performance, that it shows of itself an agreement of some sort concluded between the parties, could scarcely be said to exist to such a case."

We make a quotation from another author: "In order to make the acts such as a court of equity will deem part performance of an agreement within the statute, it is essential that they should clearly appear to be done solely with a view to the agreement being performed. For, if they are acts which might have been done with other views, they will not take the case out of the statute, since they cannot properly be said to be done by way of part performance of the agreement. On this account, acts, merely introductory or ancillary to an agreement, are not considered as a part performance thereof, although they should be attended with expense. Therefore, delivering an abstract of title, giving directions for conveyances, going to view the estate, fixing upon an appraiser to value stock, making valuations, admeasuring the lands, registering conveyances, and acts of the like nature, are not sufficient to take a case out of the statute. They are all preliminary proceedings, and are, besides, of an equivocal character, and capable of a double interpretation: whereas acts, to be deemed a part performance, should be so clear, certain, and definite in their object and design, as to refer exclusively to a complete and perfect agreement, of which they are a part execution." 1 Story Eq., sec. 762.

In *Johnston v. Glancy*, 4 Blackf. 94, the court say: "But even these acts of part performance must be done with a direct view of the agreement being performed, and be such acts as could be done with no other view, or the agreement will not be taken out of the statute."

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These principles are elementary, and are sustained by the adjudged cases, so far as we have had leisure to examine them.

Tested by these principles, it is clear that Thompson has done no act of part performance, such as will take the case out of the statute. He has made his exchange with Eunice Moffitt, and has procured from her the title to the land. But from this act it cannot be inferred that there was any contract whatever between him and the defendants. The act which he has performed is equivocal, and admits of ample explanation without supposing any contract of any kind whatever with any one else than with her. He may have made the exchange with her without intending, in any manner, to perform the contract between himself and the defendants, and with the purpose of disposing of the property in a totally different manner.

If the authorities, which we have quoted at perhaps unusual length, are not wholly at fault in the statement of legal principles, the supposed acts of part performance on the part of the appellee cannot take the case out of the statute of frauds.

It is sometimes said that equity will not permit a suitor to make use of the statute against frauds as a means of perpetrating fraud, for the reason that to do so would be to defeat the very purpose for which the statute was enacted. This may be illustrated by what was said in the case of *Clinan v. Cooke*, 1 Sch. & Lef. 22, 41. The Lord CHANCELLOR says: "But I take another reason also to prevail on the subject. I take it that nothing is considered as a part performance which does not put the party into a situation that is a fraud upon him, unless the agreement is performed; for instance, if upon a parol agreement, a man is admitted into possession, he is made a trespasser, and is liable to answer as a trespasser if there be no agreement. This is put strongly in the case of *Foxcraft v. Lister*; there the party was let into possession on a parol agreement, and it was said that he ought not to be liable as a wrong-doer, and to

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account for the rents and profits, and why? because he entered in pursuance of an agreement. Then for the purpose of defending himself against a charge which might otherwise be made against him, such evidence was admissible, and if it was admissible for such purpose, there is no reason why it should not be admissible throughout. That, I apprehend, is the ground on which courts of equity have proceeded, in permitting part performance of an agreement to be a ground for avoiding the statute; and I take it therefore that nothing is to be considered as part performance which is not of that nature. Payment of money is not part performance, for it may be repaid; and then the parties will be just where they were before, especially if repaid with interest. It does not put a man who has parted with his money into the situation of a man against whom an action may be brought; for in the case of *Foxcraft v. Lister*, which first led the way, if the party could not have produced in evidence the parol agreement, he might have been liable in damages to an immense extent."

On this subject we venture, at the risk of some prolixity, to make another extract from Browne on the Statute of Frauds, sec. 439: "The fraud against which equity will relieve, notwithstanding the statute, is not the mere moral wrong of repudiating a contract actually entered into, but which, by reason of the statute, a party is not bound to perform for want of its being in writing. This was early laid down by Lord MACCLESFIELD, Chancellor, in a case arising upon a promise of a defendant, about to marry, that his wife should enjoy all her own estate, to her separate use after the marriage, which promise, as one made 'upon consideration of marriage,' could not regularly be enforced. His Lordship declared that, 'in cases of fraud equity should relieve, even against the words of the statute, as if an agreement in writing should be proposed and drawn and another fraudulently and secretly brought in and executed in lieu of the former; in this or such like cases of fraud, equity would relieve; but where there was no fraud, only relying upon

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the honor, word, or promise of the defendant, the statute making those promises void, equity will not interfere.' "

In the case under consideration the appellant is charged with no fraud except the failure or refusal to comply with his contract. This is not such a fraud as entitles the appellee to any relief.

We have not examined as to whether the appellee has any other remedy than an action upon the contract, but upon this point we have been referred by counsel for the appellant to the following authorities: *Thomas v. Dickinson*, 14 Barb. 90; *King v. Brown*, 2 Hill N. Y. 485; *Kidder v. Hunt*, 1 Pick. 328.

The petition for a rehearing is overruled.

 JOHNSON ET AL. v. MILLER.

43	29
149	102

SUPREME COURT.—*Notice of Appeal.*—*Submission Set Aside.* —Where an appeal has been taken to the Supreme Court under the last c'ause of section 556 of the code, by procuring a transcript and filing it in said court, if there has been no notice of the appeal issued by the clerk of said court and served on the appellee or his attorney of record in the court below, or notice by publication as provided in section 557 of the code, and the cause has been submitted by the appellant upon default of the appellee, the submission will be set aside on motion of the appellee.

From the Madison Circuit Court.

J. T. Smith, C. D. Thompson, W. R. Pierse, and H. D. Thompson, for appellants.

J. Smith, for appellee.

BUSKIRK, J.—The appellee has filed a written motion to set aside the submission of this cause. The cause was tried at the October term, 1871, of the Madison Circuit Court. The transcript was filed in the clerk's office of this court, on the 27th day of November, 1871. The cause was submitted,

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on the default of the appellee, on the 29th day of May, 1872. The appeal was not taken under sec. 555 of the code, 2 G. & H. 271, during the term, and consequently it was necessary that the appellee should receive notice of the appeal. Nor was the appeal taken under the first clause of sec. 556, by serving notice on the adverse party or his attorney, and also on the clerk, but it was taken under the last clause of said section, by procuring a transcript and filing the same in this court. In such case a notice must be issued by the clerk of this court and served on the appellee, or his attorney of record in the court below; or when the notice cannot be served upon the appellee or his attorney, and it is made to appear that the appellee is a non-resident of the State, this court may order that notice of the pendency of the appeal be given in some newspaper printed and published in this State, for three weeks successively; after which the court shall proceed in all respects as if the defendant had been served with process. Sec. 557.

It does not appear that the appellee ever received any notice of the pendency of the appeal. In such case the appellee could not be called and defaulted. It results that the cause was improperly submitted.

The submission is set aside, at the costs of the appellants, of which the clerk will give them notice.

43	80
198	122
43	30
190	24

 MOORE v. CROSE.

WAY.—Appendant.—If a right of way is appendant or appurtenant to land conveyed, the right of way will pass by the deed of conveyance, and not by a separate quitclaim deed.

SAME.—A way is appendant or appurtenant when it is incident to an estate, one terminus being on the land of the party claiming. It must inhere in the land, concern the premises, and be essentially necessary to their enjoyment. It is of

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the nature of a covenant running with the land, and like it must respect the thing granted or devised, and must concern the land or estate conveyed.

SAME.—*Appendant and in Gross.*—A way appendant cannot be turned into one in gross, because it is inseparably united to the land to which it is incident; so a way in gross cannot be granted over to another, because of its being attached to the person.

TRESPASS.—*Justification.—Pleading.*—In an action for trespass to real estate, where the defendant answers claiming to justify under a deed of conveyance, he must show that the deed was made before the date of the alleged trespass.

SAME.—*Vindictive Damages.—Instruction.*—In an action for trespass to real estate, where there are no elements of malice, insult, or deliberate oppression, it is error to instruct the jury that they may allow vindictive damages.

From the Clinton Circuit Court.

H. Y. Morrison, L. McClurg, and T. H. Palmer, for appellant.

A. J. Boone, R. W. Harrison, and J. N. Sims, for appellee.

DOWNEY, J.—This was an action by the appellee against the appellant for trespass upon the lands of the plaintiff. It is alleged in the complaint, that on the 11th day of March, 1871, the plaintiff being the owner in fee simple and lawfully seized of the east half of the south-west quarter of section seven, in township twenty, north of range one west, in Clinton county, the defendant, without leave and wrongfully, entered into and upon the same and tore down and destroyed the gate and fencing, etc., thereon, whereby the plaintiff was damaged in the sum of three hundred dollars. The complaint is in two paragraphs, but they need not be separately noticed.

The defendant pleaded, 1. The general denial. 2. That he is the owner in fee simple of eighteen feet in width of the east half of the south-west quarter of section seven, in township twenty, north of range one west, in said county, beginning about sixty-four and a half rods south of the north-west corner of said half quarter section, and extending thence east about sixty-five rods to the Jefferson and Thorntown road; that defendant was, on the 11th day of March last, and a long time prior to that date, in possession of said premises, and has been in possession thereof ever since

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said time; that he was and is legally entitled to such possession; that on said 11th day of March, 1871, the defendant found a gate and a fence built across said eighteen feet of ground so in possession of defendant; that he then and there peacefully removed said gate and said fence, as he lawfully might; that these are the trespasses complained of; and defendant denies every allegation in said complaint inconsistent with the answer, or not otherwise answered therein.

3. That on the 20th day of February, 1864, one John Moore was the owner of the west half of the south-west quarter of section seven, in township twenty, north of range one west in Clinton county, Indiana; that the plaintiff was at said last named date the owner of the east half of said quarter section; that said John had no way, or inlet, in or to his said lands; that on said day he purchased of the plaintiff a cartway, beginning about sixty-four or sixty-five rods south of the north-west corner of the east half of said quarter section, and extending thence eighteen feet wide east about sixty-five rods to the Jefferson and Thorntown road; that a copy of the grant of said way is herewith filed and made a part of this answer; that said John immediately after said 20th day of February, 1864, in company with said plaintiff, located said way and agreed with him where the same should be, and took possession of the same, making said way appurtenant to said John's said lands; that said John erected and has ever since kept up the fence mentioned in the copy of said contract herewith filed; that plaintiff built his fences on each side of said way, and allowed them to remain until the 11th day of March, 1871; that the agreement which is a part of the answer, a copy being herewith filed, was fully executed; that said John retained the possession of said way with the full knowledge and acquiescence of the plaintiff, until the — day of — 18—, when he, said John, sold and conveyed to defendant his lands, the west half of said quarter section, with the appurtenances thereto; that thereupon the defendant took possession of said way, and has ever since held the possession and use

thereof; that said way is the only means of ingress and egress to and from the defendant's lands so purchased from said John, and is therefore necessary to the enjoyment of his said lands; that plaintiff erected a gate and a fence across said way, on or about said 11th day of March, 1871, without the consent of defendant and without right; that defendant peacefully removed said gate and said fence from said way, doing no damage to plaintiff's freehold or to the materials of which said gate and said fence were constructed, and placing said materials immediately outside of the limits of said way for plaintiff's use; that on the 25th day of February, 1871, said John, by quitclaim deed, conveyed all his interest in and to said way to the defendant; that the removing of said gate and said fence as aforesaid are the trespasses complained of in this action; and the defendant denies all allegations of the complaint inconsistent with the answer, and particularly denies that he in any way whatever damaged the plaintiff or his property as alleged in his complaint; wherefore, etc.

The plaintiff traversed the second paragraph of the answer by a general denial, and demurred to the third on the ground that it did not state facts sufficient to constitute a defence to the action. This demurrer was sustained by the court, and the defendant excepted. A trial by a jury terminated in a verdict for the plaintiff. A motion for a new trial was made by the defendant, which was overruled by the court, and final judgment was rendered on the verdict.

The errors assigned call in question the rulings of the circuit court in sustaining the demurrer to the third paragraph of the answer, and in refusing to grant a new trial.

The blanks in the third paragraph of the answer for the date of the deed from John Moore to the appellant leave us without any information as to the time when that deed was made. The appellant claims that the way was appendant or appurtenant to the land conveyed by that deed. If so, the right to the way passed by the deed conveying the land,

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and not by the separate quitclaim deed. "Ways are said to be appendant or appurtenant when they are incident to an estate, one terminus being on the land of the party claiming. They must inhere in the land, concern the premises, and be essentially necessary to their enjoyment. They are of the nature of covenants running with the land, and like them must respect the thing granted or demised, and must concern the land or estate conveyed. A way appendant cannot be turned into one in gross, because it is inseparably united to the land to which it is incident. So a way in gross cannot be granted over to another, because of its being attached to the person." Washb. Easm. 161. As the third paragraph does not show that the deed from Moore to the appellant was made before the date of the alleged trespass, we must hold it insufficient.

The other questions arise under the assignment of error relating to the overruling of the motion for a new trial. The reasons for a new trial, among others, were, that the damages were excessive, and that the court erred in one of its instructions to the jury. The damages were fully twice as much as the actual injury sustained. The instruction complained of is as follows: "If the jury find for the plaintiff, you may assess the damages at such sum as will cover the actual damages proved, and to this you may add such vindictive damages as you may deem just and right, having regard for all the circumstances of the case. Vindictive damages are assessed, not as payment to the plaintiff for the injury done, but as a punishment inflicted upon the wrong-doer."

In our opinion, this instruction was incorrect. It has been decided, that if a trespass has been committed with malice, insult, or deliberate oppression, the jury may join exemplary damages to the pecuniary loss. *Anthony v. Gilbert*, 4 Blackf. 348; *Taber v. Hutson*, 5 Ind. 322; *Millison v. Hoch*, 17 Ind. 227. There are no elements of malice, insult, or deliberate oppression in the case under consideration. On the contrary, it appears pretty clearly that the appellant was acting

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under the belief that he had a valid right to the way in question. The damages given in this case are small, but the same principle is applicable, and must control the case, as if the amount of the damages was greater.

The judgment is reversed, with costs, and the cause remanded, with instructions to grant a new trial, and leave to amend the pleadings, if desired.

PORTER ET AL. v. HOLLOWAY.

PROMISSORY NOTE.—*Payable in Bank.*—A promissory note payable “at the bank in Delphi” is not negotiable as an inland bill of exchange.

SAME.—*Evidence.*—Whether or not a note is payable in a bank in the State must appear on the face of the note, and cannot be ascertained or shown by extrinsic evidence.

TIME.—*28th and 29th Days of February.*—*Bill of Exceptions.*—In computing the number of days given, within which a bill of exceptions may be filed, the 28th and 29th days of February are to be counted as one day.

From the Carroll Common Pleas.

B. B. Daily, D. B. Graham, L. B. Sims, J. H. Stewart,
and *R. P. Davidson*, for appellants.

J. McCabe, for appellee.

DOWNEY, J.—Suit by the appellee, indorsee, against the appellants, as makers of the following promissory note:

“\$400.

CAMDEN, IND., Nov. 3d, 1869.

For value received, one year after date, we promise to pay Thomas H. Tobin, or bearer, four hundred dollars, at the bank in Delphi, with ten per cent. interest from maturity, without any relief from valuation or appraisement laws.

“A. PORTER & SON.”

In the rulings of the court upon the pleadings and on

the trial of the cause, the note was treated as a note governed by the law which governs inland bills of exchange.

The statute is, that notes payable to order or bearer in a bank in this State, shall be negotiable as inland bills of exchange, etc. 2 G. & H. 658, sec. 6.

It is our opinion that this note does not fall within this statute. We think that the note, on its face, should designate the bank in which it is payable, in order to come within the statute. It should carry upon its face the evidence that it is to be governed by the statute. The statute requires that it shall be payable in a bank in this State. This note is made payable in the bank in Delphi. If there is but one bank in that place, its place of payment might be ascertained by inquiry. If there are two or more banks there, it could not be known at which of them it is payable. We think it can not be left to be ascertained or shown by extrinsic evidence at what bank the note is payable. The character of the note depends upon whether it is payable in a bank or not, and we think the language of the statute requires that this fact must appear on the face of the note by a statement showing the bank at which it is payable.

A question is made as to whether the bill of exceptions is properly in the record or not. The facts are these: on the 5th day of February, 1872, the judgment was rendered, and sixty days were given in which to file the bill of exceptions. It was filed on the 6th day of April, 1872. Counsel say there were twenty-four days to be counted in February, thirty-one in March, and six in April, thus showing that the bill of exceptions was filed on the sixty-first day after the judgment was rendered. This depends upon the question whether the 28th and 29th days of February are to be counted as one or as two days. This subject was considered by this court in *Swift v. Tousey*, 5 Ind. 196, *Craft v. The State Bank of Indiana*, 7 Ind. 319, and *Kohler v. Montgomery*, 17 Ind. 220. It was held in all these cases that they were to be regarded as only one day. The last two cases related to the computation of the time when com-

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mercial paper matured. The first was with reference to the computation of the time within which an appeal could be taken. We do not find in the law library the statute of 21 H. 3, referred to by Mr. Blackstone, and hence do not know its exact language. But following the cases to which we have referred, we hold that in the computation of the time in this case the two days should be reckoned as one day.

The decision of the question with reference to the character of the note against the appellee makes it necessary to reverse the judgment.

The judgment is reversed with costs, and the cause remanded, with instructions to proceed in accordance with this opinion.

Petition for a rehearing overruled.

PORTER ET AL. v. DAUGHERTY ET AL.

From the Carroll Common Pleas.

B. B. Daily, D. B. Graham, L. B. Sims, J. H. Stewart,
and *R. P. Davidson*, for appellants.

J. McCabe, for appellees.

DOWNEY, J.—The questions decided in this case are the same as those decided in *Porter v. Holloway*, ante, p. 35; and for the reasons there stated the judgment is reversed, with costs, and the cause remanded.

Petition for a rehearing overruled.

Hunter *et al.* v. McLaughlin.

HUNTER ET AL. v. McLAUGHLIN.

PLEADING.—Promissory Note.—Want of Consideration.—To a suit brought by an indorsee of a note payable in bank, a general answer of want of consideration, and that such want of consideration was known to the plaintiff when he procured the assignment of the note from the payee, is sufficient.

SAME.—Representations.—Opinion.—An answer to a suit upon a promissory note, alleging that the note was given in consideration of the assignment of a patent right, that the payee exhibited letters patent and a model of the machine patented, and claimed that the machine, if properly constructed, would do its work well, etc., and that the defendant relied on the representations, and when the machine was properly constructed and fairly tested, it failed to produce the result claimed for it, and was of no value, was held bad on demurrer.

SAME.—As the answer did not show that the payee had ever made and used a machine, made after the model and letters patent, or that he represented to the defendant that he had made and used such a machine, the statements made were nothing more than a mere expression of opinion, which, for aught that appeared, the payee might have honestly entertained.

SAME.—Cross Complaint.—A cross complaint can only relate to the matters in question in the original complaint.

From the Decatur Common Pleas.

J. Gavin, B. W. Wilson, and J. L. Bracken, for appellants.

S. Bonner and W. Morrow, for appellee.

DOWNEY, J.—The appellant Hunter sued the appellee on two promissory notes, made by the appellee, payable to the appellant Lugenbell, in a bank, and indorsed by him to Hunter, and also to foreclose a mortgage executed by the appellee to Lugenbell to secure the payment of said notes. The notes were dated the 13th day of November, 1866; one of them matured in six and the other in twelve months after date. There was a paragraph of the complaint on each of the notes. A payment of six hundred and sixty-five dollars was made on the note first maturing, on the 13th day of February, 1867, by the appellee to Hunter, as alleged in the complaint.

The answer was in several paragraphs, but only the first, second, third, and sixth are in question.

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1. The first paragraph alleges that the notes were given without any consideration whatever, and that that fact was well known to the plaintiff when he procured the same to be assigned to himself.

2. The second alleges that the notes were given for the right to a certain pretended patent ditching machine, "Peter Lugenberg's Improved Rotary Ditching Machine," in and for certain territory in the state of Illinois, and for no other consideration whatever; that at the time of said sale to him of said pretended ditching machine by the said Lugenberg and the execution of the notes aforesaid, he, the said Lugenberg, claimed to have procured a patent therefor, and exhibited to him his letters patent, and a model of said machine, and that it was claimed by said Lugenberg for his said machine, and represented by his said letters patent and the model thereof by him constructed and exhibited as aforesaid, that said machine, when constructed according to said model and operated, would produce a certain useful result, to wit, that it would cut a ditch for draining purposes to any desired depth, by excavating the earth and carrying the excavated earth up and depositing it outside the ditch, and that said machine, in the use of the means in said model and letters patent specified without any addition to or subtraction therefrom, would produce the result above described; that the defendant having no means by practical operation to ascertain whether a machine when so constructed would produce the result aforesaid, and relying upon the representations of said Lugenberg by himself and in his said model and letters patent, purchased the right to said machine for the territory aforesaid, and gave said notes therefor; that afterward, when said machine was constructed according to said model and letters patent, it did not produce said useful result; but, on the contrary, the defendant avers that when said machine was constructed in all respects agreeable and in conformity to said model and specifications in said letters patent, and the same was fully and fairly tested, it utterly failed to produce the result, and

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was and is of no value whatever, and therefore said pretended patent is utterly void; all of which was well known to the plaintiff when he procured the assignment of said notes.

3. The third paragraph, which is in the form of a cross complaint, and which is filed against Lugenbell as well as Hunter, alleges that Lugenbell was the owner of said invention and claimed to have a patent therefor, and knowing that it was of no practical utility, and before testing its utility by actual experiment, to impose upon the defendant and others his pretended improvement, constructed a small model, not intended for practical use, but made to sell, and exhibited this instead of a machine; that this model was well calculated to deceive men of ordinary experience who had not closely studied the principle with a view to its application to the work proposed to be performed by it; that Lugenbell, well knowing that the defendant had no experience in such things, that the plaintiff Hunter was the close neighbor of defendant, that the relations of defendant and said Hunter were of the most intimate and confidential nature, and that Hunter had considerable influence over defendant, that defendant had great confidence in the judgment and integrity of said Hunter, and designing to defraud and cheat the defendant by imposing his pretended improved patent upon him, conspired and confederated with said Hunter, who also well knew the truth of all said facts, and procured said Hunter by promises of great rewards as hereinafter named, to use his influence in procuring the defendant to purchase a right in his pretended patent to the territory hereinafter named; and in order more effectually to carry out their fraudulent design, said Hunter and Lugenbell conspired together and agreed that each one should have an interest in the sales made to the defendant; and having thus conspired together, and in order to gain the entire confidence of the defendant and make him believe that said pretended improvement was valuable and useful, and would sell for large profits, the said Hunter represented to the defendant that he had entire con-

fidence in the patent; that it was the best patent in the world, and that they could soon make a fortune out of it, and that he would enter into partnership with the defendant in buying territory, concealing from the defendant the combination between him and said Lugenbell, who was his co-conspirator in the fraud, and by his false pretences, representations, and persuasions induced the defendant to go in with him in buying the right to said pretended improvement for the states of Iowa and Michigan, at the enormous sum of two thousand dollars for each state, and then proposed to defendant that he, defendant, might have his choice of states, and that they would each give his own note to Lugenbell for two thousand dollars, and have the right to said pretended improvement assigned to them separately. It is then alleged that the defendant relying, etc, chose the state of Michigan, gave two notes of one thousand dollars each, and received an assignment for said improvement in said state; that Lugenbell is still the holder of one of said notes, and of a note for two hundred and twenty dollars given to him in lieu of the other, and has instituted suit thereon in this court which is now pending; that said Hunter designing to further cheat and defraud the defendant continued to exaggerate and portray to the defendant the value and utility of said pretended improvement upon every occasion when they met, and seeking every opportunity to excite the defendant's feelings and influence his judgment upon the subject, and pretended that he was very anxious to buy more territory, and having thus secured the defendant's entire confidence, and knowing that the defendant was relying solely on his judgment, said Hunter, about two weeks after the first trade came to the defendant and represented that the state of Illinois was the best state in the north-west in which to sell said pretended improvement; that it was worth twelve thousand dollars, and he would join with the defendant in paying said sum for said state, and falsely pretended that said Lugenbell would not sell to him (Hunter), and procured the defendant to go to Lugenbell and see what he could buy the state for.

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The defendant, not mistrusting the falsehood and deception of said parties, called upon Lugenbell to know what he would take for the state of Illinois, and was answered that he would not part with all the said state for any sum, but might be induced to part with one-half of said state for six thousand dollars. A few days afterward Hunter again called on defendant and told him that Lugenbell had concluded to sell the state of Illinois for ten thousand dollars; that it was very cheap, that he would make a fortune out of it, that it was worth one hundred thousand dollars; and his influence and persuasions induced the defendant to go in with him and buy said state. Whereupon the defendant and Hunter started to Greensburg to see Lugenbell and close the trade, said Hunter being on horseback, and the defendant in a buggy. Said Hunter arrived at Greensburg first, and when the defendant came to Greensburg he found Hunter and Lugenbell together, and was informed by Hunter that Lugenbell had backed out and refused to sell said state for said sum. Whereupon Lugenbell told the defendant that inasmuch as he had promised him half of the state at six thousand dollars, he would still let him have it. The defendant declined to take it then, and asked a week to think about it. The same day Hunter again called on defendant and told him that Lugenbell wanted to see him at once, and unless he came at once and closed up the trade that he, Lugenbell, would not let him have it; that he was induced by the persuasion of Hunter to go again to Lugenbell and finally close the trade at six thousand dollars, for one half the state of Illinois, for which he executed the notes sued on. And to further cheat and defraud the defendant, and to cover up their wicked designs and get the advantage of the defendant, the said plaintiff and Lugenbell inserted in the contract assigning to him said patent right, that the defendant trusted and relied upon his own judgment and not upon the representations of the patentee or his agents, etc. It is further alleged that soon after this the plaintiff and Lugenbell, knowing the fraud, etc., so practised upon the defendant, that

the improvement was worthless, etc., and knowing the influence they had obtained over the defendant, came to him and again assured him that all they had told him about said machine was true, but that some reports had been circulated about the trade with the defendant, which tended to make the notes he had given to plaintiff and Lugenbell uncurrent in the community, and asked him, as a personal favor to them to sign a certain paper which they had prepared, which paper is in the possession of the plaintiff, the substance of which is, that the defendant had purchased said patent right on his own judgment, and that he had no offset against the notes; that at the time of his signing said statements he was wholly ignorant that the machine was worthless, and of the fraudulent combination that had been formed by the plaintiff and Lugenbell to induce him to purchase the same, but still relied on the good faith of the plaintiff and Lugenbell to make good to him all their representations of the value of said machine. He charges that the sale of the state of Iowa to the plaintiff by Lugenbell was all a sham, and made by them to influence him, and that as soon as they had induced him to purchase, the trade was rescinded for said state and the notes and assignment of said right at once destroyed and cancelled; that the pretence of the plaintiff, that he wanted to form a partnership with the defendant and buy the state of Illinois, was wholly false, and was so designed and understood between the plaintiff and Lugenbell to deceive the defendant and induce him to make said trade; that said pretended improvement and patent was and is of no value or practical utility; that the same, when built and constructed in accordance with the specifications of said patent, would not produce the result claimed for it in said letters patent, all of which was well known to said plaintiff and Lugenbell. It is further alleged that the said Lugenbell paid the said Hunter three thousand dollars for his influence, falsehood, and deception in procuring the defendant to enter into said contract. By reason of which fraud he alleges he has been damaged as follows, to wit: That before he discov-

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ered the fraud and deception practised upon him by the plaintiff and Lugenbell, he paid to said Hunter on the notes procured as aforesaid eleven mules, valued at six hundred and sixty-five dollars, and he paid to Lugenbell two hundred and eighty dollars in cash on said notes; that he was put to an enormous expense in constructing a machine under the direction of the plaintiff and Lugenbell, in the sum of three hundred and sixty-three dollars and forty cents; that he expended a large sum in testing the utility of said machine and trying to introduce it to the people of the territory so purchased as aforesaid, in the sum of two hundred and seventy-eight dollars and twenty cents, a bill of particulars of which he files. He further alleges that as soon as he fully tested the utility of said machine and found it to be wholly worthless, and as soon as he discovered the wicked combination, fraud, and deceit of the plaintiff and said Lugenbell, and the evidence by which the same could be established, he abandoned said sale and contract and rescinded the same, and notified said plaintiff and said Lugenbell of his intention to rescind the same, and offered to them a reassignment of said worthless patent, and every thing of value that he received under said contract, and demanded his notes executed, and the cancellation of the said mortgage, and the repayment to him of the amount paid on the notes as aforesaid, and demanded pay for his expenses and damages as aforesaid, which cancellation, rescission, repayment, etc., the plaintiff and said Lugenbell wholly failed and refused to do and perform, and he now brings into court the written transfer of said pretended patent to him for the state of Michigan, and certain counties in the state of Illinois, and offers to surrender the same.

The prayer is, that Lugenbell be made a party to this cross complaint, and be required to answer the same as well as the plaintiff, Hunter; that, upon a final hearing, the contract of sale to this defendant and the notes and mortgage executed in pursuance thereof, that is, the notes sued on in this case and the notes now in the hands of the said

Lugenbell as aforesaid be rescinded, cancelled, and declared null and void, and that the same by the order of the court be surrendered to this defendant; that he have judgment against the plaintiff and Lugenberg for the amount of money paid them on said contracts, and his expenses and damages as above set forth, in the sum of three thousand dollars, and all other proper relief.

6. The sixth paragraph is also made a cross complaint, and alleges that Lugenberg claimed to be the inventor of said machine and the owner thereof, and that he had procured a patent therefor; that the patented ditching machine was not new and useful, but, on the contrary, was wholly useless and of no value whatever. It then alleges the confederation and conspiracy between Lugenberg and Hunter, the making of the contracts, the ignorance and confidence of the defendant, and the fraud and deception of Hunter and Lugenberg, in substantially the same form as in the third paragraph, the pendency of the other action in the same court, by Lugenberg against the defendant, and prays judgment as in that paragraph.

There were joint and several demurrers to those paragraphs of the answer by Hunter and by Lugenberg, which were overruled, and there was an exception by the plaintiff and by Lugenberg. The first, second, third, and fourth assignments of error question the correctness of these rulings of the court.

There can be no question, we think, as to the sufficiency of the first paragraph of the answer. It is a general answer of want of consideration, and it has been held that such an answer is sufficient without any further or more particular statement; that there is nothing more particular to be stated. When it is said that there was no consideration, all has been said that can be said. It alleges that the want of consideration for the notes was known to Hunter when he procured the same to be assigned to him. This is sufficient to show that he was not an indorsee in good faith and without notice of the defence to the action on the note.

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Without this allegation, as the notes are payable in bank, the paragraph would not have been good.

The second paragraph of the answer states, 1. That the notes on which the suit was brought were given in consideration of the assignment of a patent right in certain territory. 2. That the payee exhibited to the maker letters patent and a model of the machine, and "claimed" that the machine when properly constructed would cut a ditch for draining purposes, etc. 3. That the defendant had no means of ascertaining whether it would do so or not. 4. That relying upon the representations of the payee and his model and letters patent, he purchased the right and gave the notes therefor. 5. That afterward when the machine was constructed according to the model and letters patent, and fairly tested, it would not produce the result claimed for it, and was and is of no value whatever. Therefore, it is claimed, the patent is void. 6. That these facts were known to the plaintiff when he took the assignment of the notes in question.

In our opinion, this paragraph of the answer is fatally defective. There is no warranty alleged, and as to representations, it is only stated that the payee "claimed" that the machine, when properly constructed, would accomplish certain results, etc. In *Kernodle v. Hunt*, 4 Blackf. 57, the third plea was fully as strong as the paragraph in this case, and was held good in the circuit court. But this court held it insufficient. STEVENS, J., in the opinion of the court, says: "We will examine the third plea separately. This avers, that the consideration for which the promissory notes were given was a patent right for a certain grist mill, etc.; and that the vendors represented that the said patent mill was a good, useful, and valuable improvement for grinding corn, etc., when in truth it was of no value, etc.; and that he the defendant confiding in that representation, purchased, etc. These averments are entirely insufficient. They set out a consideration, and admit that that consideration was received, and was, has been, and is, without interruption, possessed and enjoyed by the vendee; that he got all he contracted for, and that the

title is good. No defects or insufficiencies either in title or anything else connected with the consideration are complained of; there is no charge that any thing was concealed from his knowledge in any way. The complaint is, that the vendor represented it to be useful and valuable when it was not, and that he, confiding in that representation, purchased. These allegations are insufficient; no material issue can be made upon them; what one man may esteem very valuable, another may deem worth nothing. There is no averment that the vendee was ignorant of the value at the time of the purchase, and was therefore deceived. But if it were so averred, that would not of itself be sufficient." Various authorities are cited. The court further says: "The question in these cases is, did the vendor deceive the vendee by his false and fraudulent representations respecting some material fact, about which the vendee could not by common and ordinary diligence inform himself, in relation to the quality, the quantity, or the performance, etc., of the thing sold? As if the vendor, in this case, had falsely and fraudulently represented to the vendee, that said patent mill would grind one hundred bushels of grain in a given time, or that it would make good meal and flour, etc., when in truth all these statements were false; and the vendee could not by ordinary diligence inform himself, and had relied solely on the honesty and integrity of the vendor. In such a case there would be something on which to form a material issue. The plea, however, contains no such allegations."

As it is not stated in the answer in question that Lugenbell had made and used, or stated to McLaughlin that he had made and used, a ditching machine according to the model and specifications in the patent, we must presume that no such thing had been done or was stated by Lugenbell, but only, as stated in the answer, that Lugenbell showed him the model and the letters patent, and claimed that the machine, when constructed, would do so and so. This must, therefore have been nothing more than a mere expression of opinion by Lugenbell, and could not have been otherwise

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understood by McLaughlin. Lugenbell does not seem to have concealed any fact from McLaughlin, or stated any thing as a fact, but simply claimed that the machine, when constructed, would perform in a particular manner, which, we think, was only the expression of an opinion, which, for aught that appears, he honestly entertained. Regarding this paragraph of the answer, then, as setting up neither fraud nor a warranty, the language of this court in *Hardesty v. Smith*, 3 Ind. 39, is in point: "The simple fact that the improvement in the lamp was of no utility, is not sufficient to bar a suit on these notes. Parties of sufficient mental capacity for the management of their own business have a right to make their own bargains. The owner of a thing has the right to fix the price at which he will part with it, and a buyer's own judgment ought to be his best guide as to what he should give to obtain it. The consideration agreed upon may indefinitely exceed the value of the thing for which it is promised, and still the bargain stand. The doing of an act by one at the request of another, which may be a detriment or inconvenience, however slight, to the party doing it, or may be a benefit, however slight, to the party at whose request it is performed, is a legal consideration for a promise by such requesting party. So the parting with a right, which one possesses, to another, at his request, may constitute a good consideration. And where one person examines an invention to the use of which another has the exclusive right, and, upon his own judgment, uninfluenced by fraud, or warranty, or mistake of facts, agrees to give a certain sum for the conveyance of that right to him, such conveyance forms a valid consideration for such agreement. The judgment of the purchaser is the best arbiter of whether the thing is of any value, and how great, to him. The chance he may acquire of gain, the power he may obtain of preventing any other person from attempting to introduce the use of the invention in competition with some rival one such purchaser may, at the time, own the right to, or some other motive, may induce him willingly to pay a sum of money,

in such case, for that which, in the end, may prove valueless in itself. On the other hand, as we have already said, loss, or trouble, or inconvenience, or expense, on the part of the grantor, or seller, without any profit to the buyer, is a good consideration. So the simple parting with a right which is one's own, and which he has the right to fix a price upon, must be a good consideration for a promise to pay that price. In such cases, the purchaser *gets a something*, and he is estopped by the exercise of his own judgment, uninfluenced by fraud, or warranty, or mistake of facts, at the time, to afterward say it was not worth to him what he agreed to give."

In *Gatling v. Newell*, 9 Ind. 572, this court said, in deciding a patent right case: "It is not, however, every erroneous representation that will entitle a party to such rescission. The representation must be as to a fact, or facts, and go to a material matter. It must be one on which the party to whom it is made has a right to, and does rely. It it be mere matter of opinion, or exaggerated, general representation of quality, capacity, or usefulness, or be as to a matter equally open to the knowledge of both parties, or be one not relied on, the representation, though untrue, will not vitiate the contract. Especially will such be the case, where the parties stand mentally upon equal footing, and in no fiduciary relation. The law will not relieve a man, thus circumstanced, for voluntarily neglecting to exercise common sense and judgment, if he has them." Many authorities are cited in support of this doctrine.

The answer under consideration does not question the novelty of the invention. Had it alleged that the invention was not new and useful, it would, under many decisions of this, and other courts, have been a good defence to the action. *Johnson v. McCabe*, 37 Ind. 535, and cases cited. In our opinion, the court should have sustained the demurrer to the second paragraph of the answer.

The next question relates to the sufficiency of the third.

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paragraph of the answer, which is, in form, a cross bill, and which, as we have seen, sets up the facts attending the transaction out of which the notes in question grew, and also the transaction which resulted in the giving of the notes on which Lugenbell had sued McLaughlin, with great particularity. It seems to us that it cannot be successfully questioned but that the facts stated show that a fraud was practised upon McLaughlin by Hunter and Lugenbell, resulting in the giving of the notes held by Hunter, and also the notes previously executed, held by Lugenbell. But the question is, could the cross bill be sustained against Lugenbell under the circumstances? The notes held by him were executed on the 23d day of October, 1866, and he had commenced an action thereon, as shown by the cross complaint, which was pending when it was filed. These notes were given for the sale of the state of Michigan. The notes held by Hunter, on which this action was commenced, were executed on the 13th day of November, 1866, and were given for half of the state of Illinois. We think this question is presented by the demurrer of Lugenbell to the cross complaint. The ruling of the court on that demurrer is one of the errors assigned. We are of the opinion that there was not such a connection between the two contracts as to warrant the filing of a cross complaint against Lugenbell, in the suit of Hunter, and the bringing into that case the matters in litigation in the suit which had been brought by Lugenbell against McLaughlin. A cross bill is filed "touching the matters in question in the original bill." Story Eq. Pl., sec. 389; Mitford Ch. Pl. 80; *Cross v. De Valle*, 1 Wal. 1; *Frear v. Bryan*, 12 Ind. 343.

The sixth paragraph, which is also a cross complaint, must be held bad for the same reasons which have led us to hold the third bad.

Other questions are presented which arose during the trial, but those of them which are not decided by our rulings on the demurrer need not be considered, as, for the reasons already given, the judgment must be reversed,

and on another trial the same questions may not arise.

The judgment is reversed, with costs, and the cause remanded, with instructions to sustain the demurrers to the second, third, and sixth paragraphs of the answer, and for further proceedings.

MAPLE ET AL. v. BEACH.

JUDGMENT.—Evidence.—A judgment is always evidence of the fact that such a judgment has been given, and of the legal consequences which result from that fact, whether the person against whom it is offered in evidence was a party to the action in which it was rendered or not.

SAME.—But when a judgment is offered, not merely as evidence of its own existence, but as proof of some fact or facts upon the supposed existence of which the judgment was founded, the general rule is, that it is not binding upon any one except the parties thereto, those who might legally have become parties, and those in privity with them.

SAME.—The binding force and effect of a judgment offered in evidence must be mutual.

PLEADING.—Complaint.—A complaint must show a cause of action in favor of all those who unite as plaintiffs.

From the Henry Circuit Court.

M. E. Forkner and *E. H. Bundy*, for appellants.

J. Brown and *R. L. Polk*, for appellee.

DOWNEY, J.—This was an action by the appellants against the appellee. The amended complaint consisted of four paragraphs, each of which was, on demurrer thereto, adjudged insufficient, on the ground that it did not state facts sufficient to constitute a cause of action, and these rulings of the court are assigned as errors.

It appears that Stephen B. Beach was the owner of certain real estate, which he and his wife conveyed to their two sons, Elias, the appellee, and George, they agreeing to support their parents; the mother, Ann Beach, having a mortgage on the land for eighteen hundred dollars; that after this arrangement had been made and been acted upon for a time, Joseph

43	51
136	653
43	51
138	92
138	138
43	51
140	459
143	438
43	51
144	538
43	51
150	313
152	588

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Copeland became the guardian of Stephen B. Beach, on the ground, as it may be presumed, of his insanity, and instituted a suit or suits against the sons, Elias and George, the object of which was to set aside the conveyance of the land from their father to them. While this suit or these suits were pending, and, as it would seem, after the trial of them had commenced, Copeland, as such guardian, and Elias and George made a compromise and settlement of the matters in controversy, which was drawn up in the form of an agreement, but does not appear to have been signed, and which was entered of record and followed by a judgment of the court, following exactly, in its terms, this agreement. By this judgment it is determined that the mother of said Elias and George shall relinquish her mortgage on the real estate; that said Elias and George maintain and support their father and mother during their lives; that Elias and George have the control and possession and the rents and profits of the real estate for seven years and during the lives of their father and mother and the survivor of them; that they keep the farm in good repair and pay the interest on a sinking fund mortgage on same, during the same period; that at the death of both of said parents, the real estate be divided among the children of said Stephen as follows: Two-tenths to Elias, two-tenths to George, and one-tenth to each of the six daughters, or the heirs of any deceased daughter, provided, that the division shall not be made before the seven years shall expire, or the right of possession of said Elias and George be in any way impaired; that at the expiration of the seven years or at the decease of said parents, the children shall pay off the sinking fund mortgage in proportion to their interest in the land, and in case the payment of the mortgage be required sooner, each party shall pay his or her proportion at that time. It was further decreed that proper quitclaim deeds should be executed by the mother and all of said children, so as to vest in each one the interest in said real estate above specified, subject to the right of possession of said Elias and George, as above men-

tioned, the deeds to be executed within ninety days; that said Elias and George pay the taxes on the real estate during their possession; that they shall not cut down timber except for firewood, repairs, and improvements on the place; that Elias and George pay their own costs and attorney's fees, and that the other six children each pay one-sixth of the plaintiffs' costs, including attorney's fees, and that the costs of each one remain a lien on his share of the land until paid. It was further ordered that in case any son or daughter and her husband, competent to make deeds, fail or refuse within ninety days from that date to execute deeds as above decreed, on application therefor, then and in that event the portion which he or she would otherwise receive under the foregoing agreement and decree, shall not go to him or her, but shall be divided among the other parties specified, in the same proportion in which the other real estate is divided. It was further adjudged that the deadening on the eighty-acre tract on which said George lived might be cleared up by Elias and George, and the wood on it be disposed of at their pleasure; that the two or three acres of green timber on the eighty-acre tract occupied by Elias, necessary to be cleared to make the field straight, might also be cleared by them, and the timber used by them, except such parts as would make rails or improvements on the farm, which was to be applied exclusively in repairing and improving the farm; and a complete record in said cause was ordered to be made.

The action in the case under consideration was brought by four of the daughters with their husbands, the minor children and surviving husband of another daughter, and by Copeland, the guardian. Stephen B. Beach is not a party except as he is represented by his guardian. The mother of Elias and George is not a party, nor is George a party to this action. None of the parties to this action were parties to the suit in which the above judgment was rendered except Copeland, the guardian, and Elias Beach. From the judgment on which the complaint is predicated, it appears that there were six of the children of Stephen B. Beach, besides

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Elias and George. But, as we have already said, only four of them and the children and husband of another are parties to this action.

In the first paragraph of the amended complaint, it is alleged that by virtue of the decree, a copy of which is filed, Martha Canult, Sarah Kelly, Margaret Graham and Louisa Green, and George Maple, Ezra Maple, and Arthur Maple, as heirs of Harriet Maple, are each the owners in fee simple of the undivided one-tenth of the real estate, a description of which is given, subject to the life estate thereafter mentioned; that George Maple was the husband of Harriet Maple, formerly Harriet Beach, and is the father of the said Ezra and Arthur; Henry Canult is the husband of said Martha; James Kelly is the husband of said Sarah; Benjamin Graham is the husband of said Margaret, and Jesse Green is the husband of said Louisa; the said Harriet, Martha, Sarah, Margaret, and Louisa being daughters of said Stephen B. Beach; that said Elias Beach is the owner of a life estate in said land for and during the natural life of said Stephen B. Beach and his wife, Ann Beach, and of the survivor of them, and of the fee simple of two-tenths of said land by said decree; that by purchase from George he is the owner of an additional interest of two-tenths of said land in fee simple, in all four-tenths thereof, and is in possession of all of said land; that said Stephen B. Beach and his wife, Ann, are still living; that by the terms of said decree the said defendant is not to cut the timber off said farm except for firewood, repairs, and improvements on the farm, except a certain deadening and a small portion of green timber, both of which he has a right to clear up, etc. It is then alleged that, in violation of said decree and to the irreparable damage of the inheritance of the plaintiffs, the defendant has committed great waste upon said farm, in this, he has cut a great number of timber trees thereon and removed the same therefrom and converted them to his own use, the amount and number of which are, to the plaintiffs, unknown; that they were neither cut, used, nor appropriated for use as firewood,

repairs, or improvements on said farm, nor were they cut on the tract above named, on which, by said decree, he might lawfully cut timber; that said defendant is threatening and about to cut other timber on said farm, which, by said decree, he has no right to do, to the irreparable injury of the inheritance of these plaintiffs. Prayer that the defendant be required to answer for and account for the trees cut; that he answer the interrogatories filed with the complaint; that he be restrained from cutting other timber until the final hearing; that they have judgment against him for the timber cut and damages; that he be perpetually enjoined from committing waste, etc.

In the second paragraph, after referring to the decree or judgment, the copy of which is filed with the first paragraph of the complaint, and making it part of this, it is alleged that the plaintiffs have fully performed all and singly the matters and things required of them in said decree; that said George Beach, since said decree, conveyed all his interest in said land to said Elias Beach; it is alleged that the defendant has wholly failed and refused to perform the things required of him in said decree, in this, that he has wholly failed and refused, and yet fails and refuses, to execute and deliver to the plaintiffs the quitclaim deeds mentioned and required of him in said decree, though often requested so to do; wherefore the plaintiffs demand specific performance of said decree, and that the defendant be ordered and directed to execute and deliver to said plaintiffs the deeds required of him in said decree, and that his interest in said land be declared forfeited unto the plaintiffs.

After referring to the decree or judgment, and making it a part thereof, it is averred in the third paragraph, that after the rendition thereof the said George conveyed his interest in said land to said defendant, Elias; that within the time specified in the decree, the plaintiffs executed and tendered to said George and Elias the deeds of conveyance required of them in the decree, and demanded of them the conveyance required of them in said decree, and have been ready and

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willing, and are yet ready and willing, to execute and deliver the same unto them, as well as to do and perform all other things required of them in said decree, and they bring said deeds into court and tender them to the defendant. It is then stated that the defendant has wholly failed and refused, and yet fails and refuses, to execute to the plaintiffs the deeds required of him in the decree; that the defendant has committed and is threatening to commit great waste upon said lands, to the irreparable damage of the plaintiffs' inheritance in said land, in cutting and removing from the same valuable timber and timber trees on that portion of said land on which, by said decree, he has no right so to do. - Prayer for specific performance of the decree, that the defendant convey, that his interest in said land be forfeited to the plaintiffs, that he be enjoined from committing further waste, and that he account for the waste already committed, etc.

The fourth paragraph is like the third, with the addition that it is stated that in said decree the mother of the defendant was to release her mortgage mentioned therein, upon the condition that said Elias and George would maintain and support her, and upon no other consideration; that she was not a party to said action, but fully advised and assisted in procuring the compromise; that ever since the rendition of the decree, the defendant and Elias [George] Beach have fully maintained and supported their said mother; wherefore they say that she is estopped from claiming any rights under said mortgage. They further aver that said defendant has committed, and is about to commit, waste, etc., as in preceding paragraphs, and pray for specific performance, the forfeiture of the defendant's interest in the land to the plaintiffs, for an accounting as to the waste, for an injunction, etc.

It is clear, we think, that the unsigned agreement or memorandum on which the judgment in question was based, and which, in its terms, it closely follows, can give no support to the decree or judgment, or add anything to the facts alleged as a cause of action in any of the paragraphs of the complaint. So far as we can see, it was but a memorandum of

what the parties had agreed should be embraced in the judgment. The judgment and the complaint in this case upon it must stand or fall without any reference to that memorandum. In the view which we have taken of the complaint, it is not necessary for us to examine separately the different paragraphs which it contains. Counsel for appellants regard the judgment or decree as of itself vesting in the children of Stephen B. Beach the title and ownership of the land, in the proportions mentioned therein, without any conveyance for that purpose by any one. If we could so regard the judgment, it would follow, we think, that so far as the complaint seeks the specific performance of the decree or judgment, the action must be regarded as wholly unnecessary. But we have concluded that we need not decide this point, except as it may be incidentally decided in disposing of the case on another ground.

It seems to us that the idea of a complaint for the specific performance of a judgment or decree is novel, to say the least of it. It was sometimes necessary in the former equity practice to file a bill to carry a decree into execution; but this was done when the parties had neglected to proceed upon the decree; their rights under it becoming so embarrassed by subsequent events, that it became necessary to have the decree of the court to settle and ascertain them. Mitford Ch. Pl. 95. But the remedy sought in this case is not of this nature. So far as the complaint seeks to enforce the execution of deeds by the children to each other, if the judgment is valid, this was unnecessary, for the statute, 2 G & H. 230, sec. 407, provides, that when the judgment requires the performance of any act, other than the payment of money, or delivery of real or personal property, a certified copy of the judgment may be served upon the party against whom it is given, or upon the person or officer who is required thereby, or by law, to obey the same, and his obedience thereto enforced; if he refuse, he may be punished by the court as for contempt. We think, however, that it was intended by the decree or judgment that deeds should

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be executed by the mother and all the children, so as to vest in each one the interest in the real estate specified in the judgment. It is so expressly provided, and the time is limited within which it should be done.

We have come to the conclusion that the decree or judgment is not a valid and sufficient foundation for this action. None of the plaintiffs except Copeland, the guardian, were parties to the suit in which the judgment was rendered. There is no ground upon which it can be claimed that he is a necessary or proper party to this action upon the judgment. He as the guardian of Stephen B. Beach has no interest in the decree, except so far as it secures the maintenance of his ward. There is no complaint that the sons, Elias and George, have not fully performed what they agreed to do in this respect. All the other plaintiffs are strangers to the judgment. As to them it is *res inter alios acta*.

A judgment is always evidence of the fact that such a judgment has been given, and of the legal consequences which result from that fact. 1 Starkie Ev. 317; 1 Greenl. Ev., sec. 538. This is true whether the person against whom it is offered as evidence was a party to the action in which it was rendered or not. But when the judgment is offered not merely as evidence of its own existence, but as proof of some fact or facts upon the supposed existence of which the judgment was founded, the rule is very different. When the judgment is offered for this last named purpose, the general rule is, that it is not binding upon any one except the parties thereto, those who might legally have become parties, and those in privity with them. 1 Stark. Ev. 323; and 1 Greenl. Ev., sec. 252.

Another principle which governs in the admissibility and effect of judgments as evidence is, that the binding force and effect of the judgment must be mutual. Prof. Greenleaf, speaking of judgments as evidence, says: "But to prevent this rule from working injustice, it is held essential that its operation be mutual." Vol. 1, sec. 524. Mr. Starkie says:

“It is a general rule, that a verdict shall not be used as evidence against a man where the opposite verdict would not have been evidence for him; in other words, the benefit to be derived from the verdict must be mutual. This seems to be no more than a branch of the former rule, that to make the judgment conclusive evidence, the parties must be the same, for then the benefit and prejudice would be mutual and reciprocal. Where the parties are not the same, one who would not have been prejudiced by the verdict can not afterward make use of it, for between him and a party to such verdict the matter is *res nova*, although his title turn upon the same point.” Vol. 1, p. 331.

The use sought to be made of the judgment in this case is to show the invalidity of the title of Elias and George Beach, under the deed from their father. Now it is very clear that the plaintiffs in this action, who were not parties to that suit, would not have been bound by the judgment in that case, had it been in favor of the validity of that title, instead of being against it, and consequently the defendants in that judgment, Elias and George Beach, are not, as between them and these plaintiffs, bound by it.

So far as the charge of waste is concerned, it stands upon no better foundation. If the children of Stephen B. Beach were conceded to be the owners in common of the land, it would be difficult to see how a complaint in favor of part of them, in connection with Copeland, the guardian, could be sustained, under the rule which requires the complaint to show a cause of action in favor of all those who unite as plaintiffs.

There are other difficulties in the way of sustaining the complaint which may be mentioned, although nothing with reference to them need be decided.

1. There is no allegation that the mother of Elias and George ever released her mortgage, and we think the matter in the fourth paragraph, intended as an estoppel, can not be regarded as binding upon her.

2. There is no showing as to any conveyance or offer to

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convey by the mother her interest in the land, which is provided for in the decree or judgment.

3. It appears from the decree that there were six children besides Elias and George, and only four of them and the children and surviving husband of the fifth are plaintiffs in the action, or alleged to have made and tendered deeds to Elias and George according to the decree.

The judgment is affirmed, with costs.

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43	60
153	598

43	60
159	288

FALSE IMPRISONMENT.—When an arrest is made upon valid process, issued by a court having jurisdiction, trespass for false imprisonment will not lie, though the arrest be maliciously procured by the prosecutor without probable cause.

MALICIOUS PROSECUTION.—If an imprisonment be under legal process, but the action has been commenced and carried on maliciously and without probable cause, it is malicious prosecution.

FALSE IMPRISONMENT.—If an imprisonment is extra-judicial, without legal process, it is false imprisonment.

SAME.—*Malice.*—Where the gravamen of an action is for arresting and imprisoning the plaintiff without legal process, averments in the complaint relative to the malicious purposes of the defendant are only by way of aggravation.

CITY MARSHAL.—*Power to Make Arrest.*—A city marshal, under the act of 1867 (3 Ind. Stat. 75, sec. 29), has authority to arrest, without process, any person, who within his view shall commit any crime or misdemeanor, or violate any ordinance of the city, and detain such person in custody until the cause of the arrest can be investigated. If the court having jurisdiction of the offence be not in open session, he may confine the person arrested in the city prison or county jail, until he can be brought before the court; and this shall be done at the earliest period.

SAME.—The right of a city marshal to arrest and imprison in the county jail carries with it the right, on the part of the jailer, to receive and detain the prisoner.

SAME.—*Statute Construed.*—*Power to Receive Pledge for Appearance.*—Sections 38 and 40, 2 G. & H. 397, relate only to arrests made under warrants issued from courts of record, and do not authorize a city marshal or police.

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man, who has made an arrest on view, to accept of property or money as a pledge or security for the appearance of the person arrested to answer the charge.

ARREST ON VIEW.—If an offence is committed in view of an officer having authority to make an arrest on view, he may arrest the offender immediately, or as soon thereafter as he conveniently can.

FALSE IMPRISONMENT.—*Pleading.*—*Answer.*—Where a complaint for false imprisonment alleges that the plaintiff was imprisoned on more than one charge, an answer justifying the arrest on only one of the charges is bad.

SAME.—*Malice.*—*Probable Cause.*—In an action for false imprisonment, it is not necessary, to entitle the plaintiff to recover, that he should prove malice or want of probable cause.

SAME.—*Pleading.*—*Evidence.*—In an action for false imprisonment a defence of justification in making the arrest and imprisonment is not available under the general denial.

SHERIFF.—*Acts of Deputy.*—A sheriff is liable for the acts of his deputy or jailer within the scope of his authority.

FALSE IMPRISONMENT.—*Malice.*—*Evidence.*—Where officers, having charge of a person under arrest, have no authority to fix the bail and take a recognizance, or to receive in pledge any article of value as security for the appearance of the prisoner, their failure to take bail or receive such pledge is no evidence of malice.

ARREST.—*City Marshal.*—*Jailer.*—If a city marshal or police officer, having authority to make an arrest on view and to commit the prisoner to jail until such time as he can be brought before the proper authority, make an arrest and take the prisoner to a jail with the declaration that he has been arrested for an offence committed on view, that declaration stands in the place of a writ in other cases, and the jailer should receive the prisoner without regard to the question of his guilt or innocence.

CONSPIRACY.—*Liability of Conspirators for Acts of Each Other.*—If there is a conspiracy of two or more to commit a tort, each one engaged in the conspiracy is liable for the acts of the other done in pursuance of the conspiracy. So each is liable for the acts in which he participates.

POLICE OFFICER.—*Jailer.*—If police officers make an arrest and bring the prisoner to the jailer, and inform him of the arrest for a criminal offence committed in their view, the jailer, by receiving the prisoner as such, does not become liable for the former wrongful or oppressive acts of the police officers.

SAME.—If such jailer afterward unnecessarily put the prisoner in a filthy place, or otherwise exceed his authority, the police officers are not liable for such acts, unless they advise, or in some manner participate in, such oppressive excess of authority.

From the Morgan Circuit Court.

S. H. Buskirk, J. Hanna, F. Knefler, C. F. McNutt, and
G. W. Grubbs, for appellants.

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J. W. Gordon, J. C. Robinson, and W. R. Harrison, for appellee.

OSBORN, C. J.—This was an action commenced by the appellee against the appellants, in the Marion Circuit Court, and by change of venue taken to the Morgan Circuit Court, where it was tried by a jury, resulting in a verdict in favor of the appellee, in the sum of nine hundred dollars. A motion was filed, in which the appellants and each of them moved the court for a new trial, and assigned nineteen causes for the motion. It was overruled, and judgment was rendered on the verdict. Exceptions were taken to the action of the court in overruling the motion for a new trial, and a proper bill of exceptions was filed. We do not deem it necessary at this time to state the causes for a new trial set out in the motion.

The errors assigned are, 1st. That the court erred in overruling a demurrer to the second paragraph of the complaint. 2d. That the court erred in sustaining appellee's demurrers to the answer of the appellants to the complaint. 3d. That the court erred in overruling the motion for a new trial.

The original complaint contained one paragraph. To that the defendants filed separate answers of general denial. A jury was impanelled, and after hearing a part of the evidence, on motion of the defendants, leave was granted to them to file an amended and additional answer, and the jury was withdrawn. Afterward, on motion of the plaintiff, he had leave to file an amended complaint. Under that leave he filed a second paragraph. A motion was made to strike out parts of the amended complaint, which was overruled, and an exception taken. A joint answer was then filed to the whole complaint, in two paragraphs; first, the general denial; second, a justification. After an unsuccessful motion, made by plaintiff, to strike out parts of the second paragraph of the answer, a motion was made and sustained, requiring the defendants to separate and number the paragraphs, to which they excepted and filed a bill of exceptions. Under that ruling and requirement of the court, the

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defendants separated the second paragraph into three, making the answer consist of four paragraphs. The plaintiff filed separate demurrers to the second, third, and fourth paragraphs of the answer, which were sustained, to which the defendants excepted.

No question is made as to the sufficiency of the first paragraph of the complaint. Neither the demurrer nor the assignment of errors reaches that. The demurrer was filed to the second paragraph, and the ground assigned was, that it did not contain facts sufficient to constitute a cause of action, and that there was a misjoinder of causes of action set out in the two paragraphs.

The first paragraph of the complaint is for a false imprisonment. The second contains a full history of the alleged grievances of the appellee against the appellants. It is very long and, in some things, unlike anything that we have ever met with before. We have had some difficulty in determining what is the gist or gravamen of the action in that paragraph. It alleges that the defendant Boaz was acting Lieutenant of police, and the defendant Umversaw was acting Marshal of the city of Indianapolis; that they attempted to provoke and induce him to violate the penal laws of the State and the ordinances of the city, that they might have a pretence for arresting him; failing to do so, they arrested him on the false charge of profane swearing, and took him to the county jail, when the other defendant, Parker, by his jailer and turnkey, joined in the conspiracy against him, and received him from them, and confined him in jail as a prisoner, refusing to receive bail until ordered to do so by the city judge; that when he had procured bail, they preferred other false charges against him and refused to discharge him until he gave bail. It also states that the appellee was possessed of property, both real and personal, of the value of several thousand dollars; that the arrest and imprisonment were unlawfully and maliciously made on false charges and without warrant, or written, or reasonable, or probable cause; that he was afterward tried and acquitted on two of the charges; and that as to the other, it was shown

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on his trial for that, that fifteen minutes had elapsed after it had been committed, and that the offence had entirely passed before the arrest was made. There are many allegations of abuse and oppression and details of circumstances, which we think it unnecessary to repeat in this opinion. They are charged to have been done maliciously and without reasonable or probable cause.

It will be observed that it is alleged that the appellee was arrested and taken to jail by the city officers and there imprisoned, without any warrant and without reasonable or probable cause. The gravamen of the action, we think, is for the illegal arrest and imprisonment, and not for malicious prosecution. All that is said about the motive of the defendants for the arrest and imprisonment, or the circumstances connected with or attending them, can make no difference with the real ground or cause of action, only by way of aggravation. Although the code has abolished all distinctions between actions at law and suits in equity, and provided that there shall be but one form of action for the enforcement of private rights and the redress of private wrongs, legal principles remain unaltered. There has been no attempt made to change or modify them. The rights of parties remain and are adjudicated upon and settled under the same rules and regulations, except as to the form or name of the action. Before the code, if the plaintiff mistook the form of action, or sued at law when his remedy was in equity, or filed a bill in chancery when he should have sued in an action at law, he failed in his action without regard to its merits. Such results are now avoided, and parties may demand and courts grant relief according to the allegations and proofs. Before the code, the judicious lawyer investigated and made a thorough examination of the law, before commencing suit, to enable him to determine, amongst other things, to which class of actions his belonged, and under which form of the class it was to be brought. In some particulars, different rules were applicable in the different forms of actions. Then, the evidences of a thorough lawyer were

manifested by his skill as a special pleader; by the accuracy and terseness of his statement of his client's case. It seems to us that prudence should dictate to the pleader now the exercise of the same care and skill in the statement of a cause of action or ground of defence as before the code, although the consequences of a failure to do so are less fatal. The confusion growing out of the trial of a cause defectively stated, or when several causes of action are improperly joined, is the same now as before. The court is not relieved from making the proper distinctions on the trial.

In *Seeger v. Pfeifer*, 35 Ind. 13, DOWNEY, J., on page 15, says: "The distinction between false imprisonment and malicious prosecution is pretty well established. When the arrest is upon valid process issued by a court having jurisdiction, trespass for false imprisonment will not lie, though such arrest is maliciously procured by the prosecutor without probable cause." In *Colter v. Lower*, 35 Ind. 285, on p. 286, the same judge says: "If the imprisonment is under legal process, but the action has been commenced and carried on maliciously and without probable cause, it is malicious prosecution. If it has been extra-judicial, without legal process, it is false imprisonment." He refers to *Turpin v. Remy*, 3 Blackf. 210, and *Johnstone v. Sutton*, 1 T. R. 544. "Trespass is the only form of action for an assault and battery where the action is brought by the party injured." 1 Saund. Pl. & Ev. 142. Case lies in general to recover damages for torts not committed with force actual or implied. 1 Saund. Pl. Ev. 715. So where process, upon which the party is arrested or held, is irregular, trespass was the proper form. 1 Saund. Pl. & Ev. 717. Without accumulating authorities, we think the rule was correctly laid down in *Seeger v. Pfeifer* and *Colter v. Lower*, *supra*, and we must hold the second paragraph good as for a false imprisonment, and not for malicious prosecution. The gravamen of the action is for arresting and imprisoning the plaintiff without

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legal process, and the averments relative to the malicious purposes of the defendants and the circumstances of the arrest and imprisonment are only by way of aggravation.

Both paragraphs are for the same cause of action, false imprisonment. The rules of law relating to actions of trespass for false imprisonment, and not for malicious prosecution, must govern in deciding the case. We suppose that this view was not considered in the court below. Perhaps the appellee did not intend to frame the second paragraph so as to make it an action for false imprisonment exclusively; but by his averments, the fact of an arrest under legal process is absolutely excluded. Manifestly, the attention of the learned judge before whom the cause was tried was not called particularly to the paragraph during the trial.

The appellants filed joint answers to the whole complaint, and justified as public officers under the laws of the State and certain ordinances of the city of Indianapolis. Their official character is alleged to be the same as stated in the second paragraph of the complaint, and the grounds of the arrest, the violation of the criminal laws of the State and the ordinances of the city on view of the marshal, and that he and the lieutenant of police arrested him for the offences named; that the offence was committed and the arrest made in the night time, so that there was no court in session before whom he could be taken; that they immediately conveyed him to the jail of the county and then requested the turnkey of the sheriff to receive him as a prisoner, on the charge for which he was arrested; that the turnkey did so receive him, after he was informed of the reason of his arrest, and not before, when he took him into his custody and committed him to jail, and there detained him for one hour, when he was released on bail by order of the city judge; that the plaintiff was convicted of the charge for which he was arrested, on being arraigned the next morning; and that he was guilty as charged. The defendants aver that all they did in the premises was wholly without malice;

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that they had a reasonable and probable cause for arresting him, and deny all conspiracy to injure the plaintiff. It is also alleged that the jail of the county was the city jail at the time of the arrest and imprisonment, and that Parker as sheriff and jailer had the custody of all prisoners for violation of the city ordinances. Certain ordinances are set out in full, under which the defendants professed to act. It is further alleged that in making the arrest, Umversaw and Boaz did not use any more force than was absolutely necessary.

The answer consists of four paragraphs; the general denial and three affirmative paragraphs, each of the affirmative paragraphs setting up the particular offence of which the plaintiff was alleged to have been guilty, and for which he was arrested. In their general features they are the same. Separate demurrers were sustained to those paragraphs.

The city marshal has authority to arrest within the city, without process, all persons, who, within his view, commit any crime or misdemeanor, or violate any ordinance of the city and take them before the mayor or other officer having jurisdiction of the offence with which the persons so arrested are charged, and detain them in custody until the cause of the arrest has been investigated. He may also, without any writ or order of attachment, confine any person guilty of any offence against the penal laws of the State or ordinances of the city, in the city watch-house, or prison, or county jail, if the arrest be made when the court having jurisdiction of the offence with which the person so arrested is charged shall not be in open session, until there shall be an opportunity to bring him before the proper court for trial, not exceeding eighteen hours, unless by order of the court, etc. 3 Ind. Stat. 75, sec. 29.

The ordinances of the city require that the patrolmen of her police force shall arrest and take before the mayor, with or without process, all persons caught in the act of violating any ordinance of the city, or penal law of the State, and

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that they shall notify parties ignorant of the ordinances regulating the use of the streets, alleys, and sidewalks, and if they persist in violating the same, to arrest and take them before the mayor or commit to jail without process. The marshal or his assistants or any police officer of the city are also empowered and enjoined to arrest, with or without warrant, all persons who, in the night time or on Sunday, shall be found rioting, fighting, or in any manner disturbing the public peace within the city, and commit such offender to jail or the city prison for safe-keeping until complaint against him can be made to the mayor.

Each of the paragraphs to which demurrers were sustained stated that the plaintiff had been guilty of a violation of some criminal law of the State, or ordinance of the city, stating that the offence was committed on view of the appellant, the city marshal, and that the arrest was made "then and there;" that the city had no jail or prison of its own, and that the county jail had been adopted for that purpose; that the appellant Parker, through his turnkey, received the appellee from the city officer having him in custody on such arrest, in the course of his duty as jailer, after being told that they had arrested him for the offence in view, using no more force than was necessary.

We are referred by the appellee to *Low v. Evans*, 16 Ind. 486, to show that the arrest was without authority. That case was decided under the act of 1857, for the incorporation of cities. Under that act, the marshal was the chief ministerial officer of the city, and invested with the powers of a constable therefor. He was authorized to execute and return all process directed to him by the mayor or city judge, or order of the common council, and he might also execute process directed to him by any justice of the peace of the city. It was his duty to suppress all riots and disturbances of the peace, and arrest persons guilty of the same. 1 G. & H. 221, sec. 23. His authority under the act of 1867 is much more extensive. 3 Ind. Stat. 75, sec. 29, *supra*. By that act he has authority to arrest without process all per-

sons who, within his view, shall commit any crime or misdemeanor, or violate any ordinance of the city, and detain them in custody until the cause of the arrest can be investigated. If, when the arrest shall be made, the court having jurisdiction of the offence shall not be in open session, he may confine the person so arrested, in the city watch-house, or prison, or county jail, until there shall be an opportunity to bring him before the proper court or officer, which he shall do at the earliest period. We think this last act confers ample authority upon the marshal to make the arrest and commit the person arrested to prison, the act having been committed within his view and the arrest made in the night time. We think it not unreasonable to hold that, ordinarily, no court would be open in the night. The right in the marshal to imprison in the county jail carries with it the corresponding right in the jailer to receive and retain the prisoner. In *Vandever v. Mattocks*, 3 Ind. 479, it was held that a constable, as a conservator of the peace, had authority to arrest a person charged with a breach of the peace committed within his view, and to detain him a reasonable time, for the purpose of taking him before a magistrate; and in *Low v. Evans*, *supra*, on page 489, the judge delivering the opinion of the court said: "If the power exists in the ministerial officer to arrest on view, it is subject to the statutes of the State, and to general and known principles of law." We think the statute has wisely conferred the authority upon the marshal to arrest without warrant, for violations of the city ordinances, as well as the criminal laws of the State, when committed within his view, and to imprison for a reasonable time, until a trial can be had. Without such power it would be quite difficult to apprehend and bring to justice violators of the ordinances. They are often committed in the night and at other times when it is impossible to get a warrant authorizing the arrest before the offender will escape and thus avoid punishment.

The appellee insists that the officers arresting him and the sheriff's bailiff were authorized and required to take bail,

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and to accept for that purpose the money and property offered by him. He refers us to 2 G. & H. 397, secs. 38 and 40. The first provides, that any officer authorized to execute a warrant in a criminal action may take the recognizance and approve the bail. That does not authorize him to fix the amount of the bail. The other section provides, that the defendant may, in the place of giving bail, deposit with the clerk of the court to which he is held to bail the sum mentioned in the order. That section did not authorize the officers having the appellee in custody to accept of property or money as a pledge or security for his appearance to answer the charge. Those sections of the statute were not intended to apply and have no reference to arrests like the one under consideration. They relate entirely to arrests made under warrants issued from courts of record.

The appellee also insists that the arrest must be made immediately after the commission of the offence, to justify the officers for making it without warrant and as on view, and we are referred to *Commonwealth v. Carey*, 12 Cush. 246, to sustain him. That does not sustain the doctrine contended for. What was held in that case was, that a constable or other peace officer could not arrest one without a warrant for a crime proved or suspected, if such crime were not an offence amounting in law to a felony. In Addison Torts, 557, it is said: "If an assault be committed within view of a constable, he has authority to arrest the offender at the time, or as soon after as he conveniently can, so as to come within the expression 'recently,' not only to prevent a further breach of the peace, but also to secure the offender for the purpose of taking him before a magistrate." The complaint alleges that fifteen minutes elapsed between the commission of the offence and the arrest, but it does not appear that it could have been made earlier. We think the answer not defective for failing to answer that allegation.

The complaint alleges that the defendants arrested and imprisoned and detained him on the pretended and false charge of profanity; that after he had given bail for that

offence, two other false charges were trumped up and preferred against him, and that he was unlawfully, etc., detained in jail on each of these charges. Each of the paragraphs of the answer justifies the arrest and imprisonment for a single offence, charged in the complaint, but fails to confess and avoid or deny the others, although purporting to answer the whole complaint. For that cause they are bad, and the demurrers to them were correctly sustained.

An answer had been filed, containing a paragraph justifying each of the several acts of trespass alleged in the complaint. On motion of the plaintiff, the court required the defendants to separate and number the paragraphs, so that each paragraph should contain only a justification for one alleged trespass. The defendants excepted to the ruling of the court and saved the question by a bill of exceptions, but failed to assign it as error, and the question is not before us for our decision.

The cause was submitted to a jury for trial on the general denial, and a verdict rendered for the appellee, as hereinbefore stated.

It will not be necessary to notice all the reasons assigned for a new trial in the appellants' motion. Some are not available reasons for a new trial, and some are abandoned in this court. Those relied upon for a reversal of this cause relate to instructions given and refused and the damages assessed by the jury.

The court was asked to instruct the jury, that in order to maintain the action, they must find from the evidence that the acts of the appellants complained of must have been done maliciously and without probable cause. We think the court committed no error in refusing such instructions. The action was for false imprisonment, and not malicious prosecution, and it was not necessary to prove malice or want of probable cause. *Colter v. Lower*, 35 Ind. 285. The averments of malice did not change the gravamen of the action. They only tended to show aggravation. We do not think it necessary to copy the instructions relating to that question,

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or refer to the numerous authorities examined. The case last cited is decisive on that point. We are satisfied with and adhere to it.

The court committed no error in refusing to give the instructions asked relative to the protection of the officers, in making the arrest, as a full and complete defence to the action. Demurrers had been sustained to the answers justifying the arrest and imprisonment. Such defence was not available under the general denial. Sec. 91, 2 G. & H. 113; *Wood v. Mansell*, 3 Blackf. 125; *Lair v. Abrams*, 5 Blackf. 191; *Johnson v. Cuddington*, 35 Ind. 43.

The eighth instruction asked by appellants and refused required the court to instruct the jury, that if Parker was not personally present when the appellee was arrested and imprisoned and did not know of such arrest and imprisonment until after his discharge, and that if it was not by his procurement, they should find for him. The instruction was correctly refused. Parker was liable for the acts of his deputy, or jailer, within the scope of his authority. Addison Torts, 931.

The appellants in their eleventh instruction asked the court to charge the jury, that they had no authority to fix the bail and take a recognizance of the appellee, until the amount had been fixed by the city judge, and that they had no right to receive in pledge any article of value as security for his appearance, and that their failure to do so was no evidence of malice. The court refused to give it, but gave the following as a substitute: "I think the jailer had no right to fix bail, therefore his refusal to fix the bail was not evidence of malice; but the fact that he had no right to fix bail would not authorize him to put the plaintiff into a filthy place, amongst drunken men, even if he had the right to detain him in custody."

The complaint alleged that the appellee had offered to give to the appellants property in pledge for his appearance to answer the charge for which he was then under arrest; that they had refused to take it and discharge him, and had

maliciously detained him in prison. He had also offered evidence to sustain it. The object of the charge was to inform the jury that they had no authority to fix the bail or take property in pledge for his appearance, and that their failure to do either was no evidence of malice. In the substituted charge the court told the jury that they had no right to fix the bail, but omitted to tell them that the appellants had no right to receive the pledge. They were told that the failure to fix the bail was no evidence of malice, but they were not told that the refusal to receive the pledge and discharge the appellee was not evidence of malice. We have already shown in a former part of this opinion that they had no authority to do either. Malice was an important element in the action to increase the damages, and we think the appellants were entitled to have the charge given as it was asked.

We have said that the marshal had authority to arrest when the offence was committed in his view and, under certain circumstances, commit to jail; that such authority necessarily conferred upon the jailer the right to receive and imprison the prisoner. If he had the right to receive the prisoner when brought to him by the marshal with the declaration that he had been arrested for an offence committed on view, that declaration would stand in the place of a mittimus in other cases, and it would be the duty of the jailer to receive him as a prisoner, without regard to the question of his guilt or innocence.

The tenth instruction asked and refused recognized this doctrine. But it went further and told the jury that in such case they must find for Parker, the sheriff, and the court did right in refusing it, because there was no answer justifying his acts as jailer.

There is one other question in the case, and that is how far the appellants are liable for the acts of each other. If there was a conspiracy between them or any two of them, each of them engaged in the conspiracy is liable for the acts of the other, done in pursuance of the conspiracy. So

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each is liable for acts in which he participated. If the police officers arrested the appellee and brought him to the jail, and then delivered him to the jailer as a prisoner, informing him of the arrest for a criminal offence committed on their view, by receiving him as jailer, he did not thereby become liable for their prior wrongful or oppressive acts. And if the jailer unnecessarily put him into a filthy place, or otherwise thereafter, whilst holding him in custody, exceeded his authority, the police officers did not become liable with the jailer, unless they advised or in some manner participated in such oppression or excess of authority.

The judgment of the said Morgan Circuit Court is reversed, with costs; and the cause is remanded, for further proceedings in pursuance of this opinion, with leave to both parties to amend their pleadings.

BUSKIRK, J., having been of counsel was absent.

Petition for a rehearing overruled.

CHASE v. THE ARCTIC DITCHERS.

DITCHING ASSOCIATION.—Variance.—Where the articles of association of a corporation gave the corporate name as "The Arctic Ditchers," and the assessment of benefits was made in the name of "The Arctic Ditchers' Association," the variance was not fatal to the assessment on appeal.

SAME.—Filing Assessment.—From the date of the filing of the assessment in the recorder's office it is a lien on the lands assessed, without regard to the date at which it is recorded.

SAME.—Filing Articles.—The filing of the articles of association in the recorder's office fixes the date at which a company becomes a corporation.

MOTION FOR NEW TRIAL.—The erroneous sustaining of a demurrer to a complaint is not a reason for a new trial.

From the Tipton Circuit Court.

J. Green and D. Waugh, for appellant.

N. R. Overman, N. W. Parker, and J. T. Cox, for appellee.

DOWNEY, J.—A corporation was organized, under proper

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articles of association, in pursuance of the draining law of 1869, 3 Ind. Stat. 222, by the name of "The Arctic Ditchers." Appraisers were appointed, and an assessment was made and a schedule returned. The appellant, whose lands had been assessed, appealed to the circuit court. In the circuit court the appellant filed an answer consisting of five paragraphs. In the first, he alleges that the association was organized, and, in its articles of association, denominated "The Arctic Ditchers," and that the assessment was made by, and in the name and style of, "The Arctic Ditchers' Association." In the second, it is stated that the lands of the appellant were in no wise benefited by the construction of the proposed drain. In the third, it is affirmed that the appraisement of benefits was not recorded in the recorder's office within thirty days from the time of giving notice of the filing of the same for record, and was not recorded for six months after the notice of filing was given as aforesaid. In the fourth, it is asserted that the articles of association were not recorded in the recorder's office of Tipton county, Indiana, before the assessment was made. And the fifth is as follows: "And for further answer defendant says that the lands described in the supposed assessment of benefits are not benefited to the amount of the said assessment, that the assessment is excessive."

Demurrers were filed to the first, third, and fourth paragraphs of the answer and sustained. There was a reply by general denial to the second and fifth paragraphs. A trial by jury terminated in a verdict for the appellee, assessing the benefits in the same amounts as were assessed by the appraisers. Motions for a new trial and in arrest of judgment were made by the appellant and overruled, and there was final judgment for the appellee on the verdict.

The errors assigned are, 1, 2, and 3, sustaining the demurrers to the first, third, and fourth paragraphs of the answer; 4, overruling the motion for a new trial; and, 5, overruling the motion in arrest of judgment.

The first question is, whether the variance in the name

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of the corporation, alleged in the first paragraph of the answer, is fatal to the assessment. The order of the court appointing the appraisers is not set out in the record, but the assessment commences as follows: "We, the undersigned, appointed by the Court of Common Pleas of Tipton county, Indiana, as appraisers, to perform the duties devolving upon us by law as appraisers of 'The Arctic Ditchers' Association,' having been ordered by the board of directors," etc. Then follows a description of each tract of land of the appellant, with the statement that the benefits are for the construction of the drain of The Arctic Ditchers' Association, and the amount of the benefit to each tract is stated. We are referred by counsel for the appellant to *Glass v. The Tipton, etc., Turnpike Co.*, 32 Ind. 376, to show that the assessment is void for this variance in the name of the corporation.

In case of an appeal under the act in question, there is no law by which the court must be governed in the disposition of the case on appeal. The act, sec. 6, simply says, "*Provided*, that upon filing such schedule for record, the secretary shall give notice thereof by posting a notice in a conspicuous place in the recorder's office, and any party aggrieved by any such assessment may within thirty days thereafter appeal therefrom to the circuit or common pleas court of said county." In the case under consideration, the court and the parties seem to have supposed that the proper practice was for the appellant to plead to the assessment or transcript treating it as a complaint. We do not decide that this was the proper course, but as it was adopted and followed in the court below without objection, we make no question with reference to it. How far ought a defect in the assessment to be allowed to control the case on appeal? It seems to us that if there was no valid assessment made in the first place, this may be shown on appeal, in a proper mode, and that where shown it will be sufficient to set aside the proceeding, so far at least as it is erroneous or invalid. But we cannot think that there is any fatal variance in the name

of the corporation, nor do we think that the case in 32 Ind. is an authority in this case.

The next question is as to the time within which the assessment must be recorded. It is alleged in the third paragraph of the answer that it was not recorded for six months after the notice of the filing of the same in the recorder's office. By the sixth section of the act, the assessors are required to return their assessment to the secretary of the company, and he is required to cause it to be filed for record in the office of the recorder of the county in which the land therein described shall be situated. From the date of such filing, the assessment becomes a lien on the land assessed. Upon the filing of the schedule for record, the secretary is required to give notice of such filing by posting notice, etc. The time of recording the schedule or assessment seems not to be very material. The filing of it fixes the time when the lien accrues, and the time of giving the notice seems to govern the time within which the appeal may be taken. We think the demurrer to the third paragraph of the answer was rightly sustained.

The fourth paragraph of the answer relies upon the failure to record the articles of association before the assessment was made. There is nothing in this objection. The filing of the articles of association is the act which fixes the date at which the company becomes a body corporate. Sec. 3.

The first, second, and third reasons for a new trial are the alleged errors in sustaining the demurrer to the first, third, and fourth paragraphs of the answer. These are not reasons for a new trial, and have already been considered. The other reasons are, that the verdict is not sustained by sufficient evidence, and is contrary to law. The evidence is not in the record, and we can decide nothing on these points for that reason.

The judgment is affirmed, with costs.

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MALICIOUS PROSECUTION.—Evidence.—In an action for malicious prosecution, evidence offered by the defendant to prove that before the prosecution against the plaintiff was commenced, he consulted for advice and direction one who had for twelve years been a justice of the peace, but who was not the justice before whom the prosecution was commenced, and made to him a full and fair statement of all the facts, and was by him advised to institute the proceeding, is inadmissible, for the purpose of showing that the defendant acted with probable cause and without malice.

SAME.—If the defendant in such action, before the suit alleged to have been malicious was instituted, in good faith consulted a practising attorney, and made to him a full and fair statement of his case, and was advised by the attorney to prosecute his complaint, this is a strong circumstance to repel the presumption of malice and want of probable cause.

SAME.—Probable Cause.—Statements of Credible Persons.—A defendant in such an action, in making up his belief of probable cause for instituting the prosecution alleged to have been malicious, is justified in giving credit to the statements of credible persons, whom he believes.

INSTRUCTIONS.—It is the duty of a party who desires a particular charge to prepare it and ask that it be given to the jury, and if he fails to do so, and the court omits to charge on the subject, he cannot complain.

From the Tippecanoe Common Pleas.

X. A. Stein and W. D. Mote, for appellant.

R. C. Gregory, R. P. Dehart, J. R. Coffroth, and T. B. Ward, for appellee.

WORDEN, J.—This was an action by the appellee against the appellant for malicious prosecution in suing out and prosecuting a peace warrant against the plaintiff, on the charge that the defendant had just cause to fear, and did fear, that the plaintiff would destroy and injure his personal property. Issue, trial, verdict and judgment for the plaintiff.

No question is made upon the pleadings. The appellant moved for a new trial, but his motion was overruled. We will notice the grounds upon which it is here urged that a new trial should have been granted. A bill of exceptions shows that the defendant “offered to show by his own testimony, in order to show that he had acted with probable cause and

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without malice in prosecuting a peace warrant against the plaintiff, that before suing out the peace warrant against the plaintiff, he had consulted for advice and direction Joseph Mitchell, who resided at the Battle Ground," near which both parties resided, "and for twelve years before July, 1869, had been a justice of the peace in active practice; all well known to the defendant; and had made a full and fair statement to the said Mitchell of the facts and circumstances which led him to apprehend injury to his property at the hands of the plaintiff; and that thereupon the said Mitchell had advised him to sue out a peace warrant against the plaintiff, and that he had acted in pursuance of that advice; but the plaintiff by her counsel objected to all such testimony, and the court sustained the objection and refused to allow the testimony to be given, to which the defendant then and there excepted."

We are of opinion that the ruling of the court below was correct, and the evidence properly excluded. In *Olmstead v. Partridge*, 16 Gray, 381, like evidence was offered and excluded. We make the following extract from the opinion of the court in that case:

"In actions for malicious prosecution, it has been held to be competent for the defendant to prove, in order to establish the fact of probable cause, that in prosecuting the plaintiff on a criminal charge he acted in accordance with the advice of counsel on a full and correct statement of all the material facts bearing on the case. * * *. But such testimony has always been limited to communications with counsel or attorneys. Statements made to other persons and advice given by them have never been deemed admissible. The law wisely requires that a party who has instituted a groundless suit against another should show that he acted on the advice of a person who by his professional training and experience and as an officer of the court may be reasonably supposed to be competent to give safe and prudent counsel on which a party may act honestly and in good faith, although to the injury of another. But

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it would open the door to great abuses of legal process, if shelter and protection from the consequences of instituting an unfounded prosecution could be obtained by proof that a party acted on the irresponsible advice of one who could not be presumed to have better means of judging of the rights and duties of the prosecutor on a given state of facts than the prosecutor himself."

The case of *Wilkinson v. Arnold*, 11 Ind. 45, is relied upon by counsel for the appellant, but that case is not in point here. In that case the communication was made to the justice before whom the prosecution was instituted. Here it was not. The prosecution for surety of the peace was had before justice Wm. R. Todd. This difference, however, may not of itself be very important. But in that case the alleged malicious prosecution was for the larceny of corn, and the defendant offered to prove that he informed the justice that he had detected the plaintiff in clandestinely pulling and carrying away the corn in question, and that he desired to commence a prosecution therefor if it was in violation of the criminal law of the State; and that the justice, after examining the statute, informed him that it was a larceny, and that thereupon the justice drew up the affidavit for that crime. These facts were held to be a part of the *res gestæ*, and competent, the court observing that "if the prosecution was instituted for a felony instead of a misdemeanor, entirely through the mistake of the justice as to the legal character of the supposed offence, this might well be considered by the jury in determining the question of malice." In that case the justice gave no advice, according to the evidence proposed to be given, but simply informed the party that the facts stated amounted to a larceny and drew the affidavit accordingly.

In the case under consideration, the facts offered to be proved constituted no part of the *res gestæ*, nor did they tend to show that the prosecution in any manner grew out of any mistake in point of law of the justice before whom the proceedings were had.

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It may be observed that the defendant was allowed to prove, and did prove, that before commencing the proceedings, he consulted "an attorney at law having his office at the Battle Ground," and stated to him all the facts, and was advised by him that his remedy was to sue out a peace warrant.

In view of this evidence, as we suppose, the court gave the following instruction, which was excepted to by the defendant: "If you find that the defendant in good faith consulted a practising attorney, and made a full and fair statement of his case to him, and was by him advised to prosecute his complaint for surety of the peace, this is a strong circumstance to repel the presumption of malice and want of probable cause." The objection to this charge is, that the term "practising attorney" is used. We are of opinion, however, that the charge was entirely appropriate, in view of the defendant's own testimony, by which it appears that the person whom he consulted was "an attorney at law having his office at the Battle Ground." It is reasonable to infer that he was a practising attorney from the fact that he had an office. The charge in this respect is clearly correct in the abstract, and as applied to the evidence. Moreover, if the defendant desired an instruction upon this point leaving out the qualifying term "practising," he should have asked it.

We now pass to the next point. The defendant asked, and the court refused, the following instruction: "In making up his belief, the defendant was justified in giving credit to the statements of such persons as he was accustomed to believe and did believe." The court, however, did charge as follows: "In making up his belief, the defendant was justified in giving credit to the statements of such persons as were credible and whom he did believe." The charge given was as favorable as the defendant had a right to ask.

One of the assigned reasons for a new trial was, that "the court erred in giving each and all of the instructions, omitting to instruct the jury which or what of the facts, if proved,

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amounted in law to the legal probable cause which justified the defendant in suing out the peace warrant on which this suit is grounded." In respect to the charges given or refused, no error is pointed out in the brief of counsel other than those above noticed. The supposed error in failing to charge as to what facts, if proved, did or did not amount to probable cause, if error at all, was error of omission, and not of commission. It may be conceded that the question as to what amounts to probable cause is a question compounded of law and fact; that when the facts are ascertained, it is a pure question of law whether they amount to probable cause. It may also be conceded that it is the duty of the court to give to the jury precise and definite instructions on this subject, either by hypothetically stating the case claimed to have been made by either party, where the facts are disputed, or otherwise, so as to leave the jury free to determine the facts, but fully enlightened as to the legal effect of the facts to be found by them.

But it is not error, such as will reverse a judgment, for the court to omit charging on this subject in the absence of any request to do so. In this, as well as in other cases, it is the duty of the party who desires a particular charge to prepare it and ask that it be given to the jury; and if he fails to do so, and the court omits to charge on the subject, he cannot complain.

We have thus noticed all the grounds on which a reversal is asked in the brief of counsel for the appellant, and are of opinion that none of them are well taken.

There is no error in the record, and the judgment must be affirmed.

The judgment below is affirmed, with costs.

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43	83
131	521
43	83
137	489

RAILROAD.—*Tax to Aid in Construction.*—Where the county commissioners, on a proper petition, ordered an election to be held in a township of the county, to determine whether an appropriation should be made by the township to aid in the construction of a railroad, and the election was held, and resulted in favor of the appropriation; and afterward the boundary line between the township voting to make the appropriation and an adjoining township was changed, so as to detach from the latter a strip of land one-half a mile wide and annex the same to the former; and the railroad, after the vote was so taken, was located and built in and through the strip of territory so annexed, without passing into or through the territory which constituted the township at the time the vote was taken;

Held, that no tax to aid in the construction of the railroad, as it was located and built, was authorized to be levied by the vote taken.

Held, also, that, to authorize the levy, the road should be built within the territory of the township as it existed at the time the vote was taken.

From the Gibson Circuit Court.

C. Denby, A. C. Donald, C. Baker, O. B. Hord, and A. W. Hendricks, for appellants.

G. V. Howk, W. W. Tuley, and O. M. Welborn, for appellees.

BUSKIRK, J.—This action was commenced by the appellants against the appellees, to enjoin the collection of a railroad tax assessed in White Rivertownship of Gibson county, the appellees here and defendants below being the treasurer of said county and the railway company in aid of whose road the tax was assessed.

The complaint was demurred to by the appellees on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and appellants refusing to plead further, final judgment was rendered for appellees and against appellants. Proper exceptions were taken.

The ruling of the court below in sustaining the demurrer to the complaint is the only error assigned, and for this a reversal of the judgment is asked.

The facts averred in the complaint, and necessary to a

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clear understanding of the question presented for our decision, are these:

1. At the June Term, 1869, of the Board of Commissioners of Gibson county, an order was made by said board, upon the proper petition, directing an election to be held in White River township of said county, to determine whether an appropriation should be made by said township in aid of the construction of The New Albany and St. Louis Air Line Railway Company.

2. The time fixed, in said order, for the holding of said election was July 12th, 1869, and the vote was taken and resulted in favor of the appropriation.

3. Afterward, at the September session of 1869, of said board of commissioners, on the petition of sundry citizens of White River and Patoka townships of said county, the boundary line which divided said townships was changed, detaching from Patoka township a strip of its territory one-half mile in width and annexing the same to the said White River township.

4. That at the June session, 1870, of said board, the tax sought to be enjoined was levied upon the taxable property within said township (including that of the appellants), for the purpose of carrying into effect the vote so taken.

5. That the road, prior to the filing of the appellants' complaint, was not only located, but actually built, in and through the strip of territory so annexed to White River township, but without passing into, through, or touching the territory which constituted said township at the time said vote was taken or at any previous time.

The complaint does not show whether the location and construction of the road through the annexed strip were before or after the levy of the tax sought to be enjoined.

It is conceded by the learned counsel engaged in this cause, that it is one of first impression, that the case is barren of authority. It is stated by counsel that after a diligent and thorough examination of text books and reports,

they have been unable to find anywhere an adjudicated case in point, or even an analagous authority.

We have concluded to permit counsel to state their respective positions in their own language. The argument has proceeded in the following order: 1. Original brief by counsel for appellant. 2. Brief by counsel for appellees in answer to positions assumed in original brief. 3. Supplemental brief by counsel for appellants in reply to positions taken by counsel for appellees. The positions assumed in original brief will sufficiently appear from the others. We shall, therefore, quote from the brief of appellees and the supplemental brief of appellants.

Counsel for appellees argue as follows:

"The matter in controversy between the parties to this action is fairly presented to this court under the first error assigned; and to the consideration of this matter, thus presented, the attention of this honorable court is respectfully invited. Does the appellants' complaint state facts sufficient to constitute a cause of action? This is the real and only question in this case. The appellants allege that the tax assessed, of which they complain, is illegal for two reasons; first, because there is no law which authorizes a tax to be assessed for such purposes. This objection to the tax assessed has been settled adversely to the appellants, in the case of *The Lafayette, etç., Railroad Co., v. Geiger*, 34 Ind. 185, and nothing further need be said about it by the appellees.

"The second reason by the appellants for the illegality of the tax, is this: 'because, although said railroad was located and built through the territory so annexed to White River township, after said vote was taken, it is not located to run into or through the territory, which constituted said township when the vote was taken, or at any time prior thereto.' Upon this second reason, if it be a reason, the appellants now hang all their hopes of obtaining a reversal of the judgment in the case. The appellants concede that the appellee, the said Air Line Railway Company, has located and built its railroad through said White River township, as the said

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township was constituted at the time said railroad tax was levied; but they say that, because the said railroad does not run into or through said township, as it was constituted when the vote was taken for and against said railroad tax, therefore the said tax was and is illegal. This is the whole argument of the appellants. They liken their case to that of a subscription upon a condition precedent; and upon this hypothesis they have made a very respectable argument. But their whole argument is founded upon a mistaken view of the facts and the law of the case. The vote given by White River township, in favor of the railroad appropriation, was not and could not be, under the railroad aid act or the state constitution, a subscription by said township to the capital stock of said railway company, either conditional or otherwise. The power to make the subscription, or 'to take stock in such railroad company,' as it is expressed in the 14th section of the railroad act, is not conferred by said act until after the assessment, or some part thereof, has been collected. The appellants do not say that there had been collected any part of the tax assessed in aid of said railroad company; in fact, as they say they 'sue not only for themselves, but also for and on behalf of all the taxpayers of White River township,' it may be fairly inferred that no part of the said railroad tax had been collected, at the time of the commencement of this suit. Therefore, there had been no subscription made, either conditional or absolute, in the name of said township, to the capital stock of said railway company; and, therefore, the argument and authorities of the able attorneys of the appellants are not applicable to the case now under consideration.

"The appellants say in their brief that 'technically the railroad company may say that their railroad is located through White River township.' The appellees do not say this *technically*; but they do say, as a matter of absolute and unquestioned fact, the truth of which is conceded in appellants' complaint, that the said railroad had been located and built through said township, at the time of the

commencement of this action. The appellants do not claim in their complaint that the appellee, the said railway company, had aught to do with the alleged change of the dividing line between the townships of Patoka and White River. It is not clear, however, from the averments of the complaint, that the appellants were not the moving spirits in obtaining the alleged change of this dividing line. Upon this point, the complaint avers, 'that afterward' (that is, after White River township had voted for the railroad appropriation), 'at the September term, 1869, of the board of commissioners of said county, on the petition of sundry citizens of White River and Patoka township, in said county, the township line dividing said townships was changed, by annexing a strip of territory, one-half mile in width, to White River township, and taking the same off Patoka township.' Who these sundry citizens were does not appear; and it is perhaps immaterial, as it seems that the board of commissioners had the right and power to make such alterations in the boundaries of the townships as they deemed proper, of their own motion and without any petition. 1 G. & H. 637. But it is clear that the change was made in the said township line without the action or procurement of the appellee, the said railway company. The learned counsel of the appellants, in their brief in this cause, use this language: 'Now if the town were itself, by its own action, to extend its boundaries, and after such voluntary action the road were located within the prescribed distance, the town would probably be liable to pay the additional' (should be *conditional*) 'subscription.' And then the argument of the appellants proceeds: 'But in this case, the power of changing the township boundaries belongs to the county board.' In this respect, the law makes the county board the agent of the citizens, to act as the 'convenience of the citizens may require.' 1 G. & H. 637. The act of the county board, in changing the dividing line between White River and Patoka townships, was therefore the act of the two townships. For aught that appears to

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the contrary, in appellants' complaint, every citizen of both townships, including the appellants in this case, joined in the petition upon which the said township line was changed as stated in said complaint. Of this change it is certain that White River township, in its corporate character, ought not to and cannot complain, as it added largely to its wealth and taxables. And if White River township, in its corporate capacity, cannot complain of this action of the county board, enlarging its boundaries, then surely the corporators, the citizens residing within the territorial limits of said township ought not to be permitted, either individually or collectively, to complain of such action or any of its legitimate results. Appellants counsel say, in their brief: 'It might occur that a township boundary should be largely expanded; in which case the original township would derive no benefit from the railroad.' That is clearly a *non sequitur*. It is true, that a township might be so large that a citizen of the township, who lived and had his property remotely from the line of the proposed railroad, would derive little or no direct personal benefit from the construction and use of such road. But the township, as a body politic and corporate, must and will always derive benefit from the construction and use of a railroad within its territorial limits, no matter how large its territory may be, by the mileage valuation of such railroad and its appurtenances, and by the uniformly increased valuation of the real estate adjacent to such railroad, for the purposes of taxation.

"The theory of our railroad aid act is this, that counties and townships, not territorially, but as bodies politic and corporate, are always benefited by the construction and use of railroads into and through their territorial limits, by the value of the peculiar property of railroads, and by the invariably increased valuation of other property, for the purposes of taxation; and inasmuch as these results have always followed the construction and use of railroads, inasmuch as these enterprises have invariably benefited the general public of the counties and townships into and through which

railroads run, the law has wisely provided that counties and townships in their corporate capacities may raise money by taxation and use the same in aid of the construction of railroads, by taking stock in and making donations to railroad companies.

"The strip of territory annexed to White River township, by the action of the county board, is said to be half a mile wide; its length is not given. It does not appear from appellants' complaint that this strip of ground was ever inhabited by any one, and certainly not by any of the appellants. It would seem that if any one could complain of the said railroad tax, it would be the possible resident of this half mile strip of annexed territory; for such an one had no vote either for or against the railroad appropriation. But when this half mile strip was lawfully annexed to White River township, it became and was a component part of the territory of said township, to the same extent that it would have been if it had been embraced within the boundaries of said township from its earliest organization. And the citizens resident upon the said annexed strip were members of the body politic and corporate known by the name of White River township, were possessed of all the rights and privileges, and were subject to all the duties and burthens (the railroad tax included) of the 'oldest inhabitant' of said corporation.

"Suppose, as the fact is, that Patoka township had also voted, before the change of the township line dividing it from White River township, for an appropriation in aid of said railway company. Afterward and before the levy of the tax, the county board made the change in said dividing line by taking off from said Patoka township a half mile strip of its territory, and annexing the same to said White River township, and the appellee, the said railway company, had located and built its railroad through said half mile strip. Now, under these circumstances, it is perfectly clear that the tax voted for in the township of Patoka could not be lawfully assessed, after the said change of the town-

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ship line, although the said railroad was located and built through the said strip of ground, which at the time of the vote was within the boundaries of said Patoka township. The reason for this is, that at the time fixed by law for the assessment of the tax voted for, the strip of ground through which the said railroad was located and built was not within the boundaries of said Patoka township. The appellees respectfully submit that the converse of this proposition is equally true and clear; that where a township has legally voted for a railroad appropriation, in aid of the construction of a certain railroad, the tax provided for by law, as the result of such vote, may be lawfully assessed and collected, whenever it appears, at the time fixed by law for such assessment, that such railroad has been located into or through the then existing territory of such township, without any regard to the question whether such territory has been enlarged or diminished since the said vote.

“In conclusion, the appellees respectfully submit, that the appellants have utterly failed to show in their complaint, either that the tax assessed was or is void, or that the collection of such tax ought to be enjoined. On the contrary, it clearly appears from the averments of said complaint, that all the requirements of the railroad aid act, preliminary to the assessment of said tax, had been strictly and literally complied with; that the said tax was duly assessed at the proper time, by the proper authority, and in obedience to the positive mandate of law; and that in collecting the said tax, so assessed as aforesaid, the appellee Whitney was simply discharging the plain duty imposed on him by law. If there is any doubt in this case, which the appellees emphatically deny, it is a doubt which has not yet arisen, and cannot arise until after the assessment, or some part thereof, has been collected. Then it will be the proper time, under the law, for the proper authority to determine whether or not the said railroad has been constructed in or through said White River township, and upon such determination to

make such disposition of the moneys collected under the said assessment as the statute prescribes.

"The able counsel of the appellants truthfully say, in their brief herein, that this case is barren of authority. In this view of the case, the appellees and the appellants fully concur. After a diligent and thorough examination of text-books and reports, the appellees confess their utter inability to find anywhere an adjudicated case in point, or even an analogous authority. So far as they can learn, this case is *sui generis* and without any precedent.

"The appellants insist, throughout their brief, that the action of White River township, in relation to the railroad appropriation, down to and including the vote of said township in favor of said appropriation, was equivalent to a subscription, then made by said township to the capital stock of said air line railway company, upon the condition that the said railway company should construct its railroad in or through the then existing territory of said township. On the other hand, the appellees deny that the said action of the said township, upon the said railroad appropriation, was equivalent or even analogous to such a subscription to the capital stock of said railway company, or was subject to any such condition. In fact, the appellees say that, under the terms of the railroad aid act, sec. 14, 3 Ind. Stat. 394, no subscription was then made, and no stock was then taken, or could have been taken, by or in the name of said township. The vote of said township was taken on the 12th day of July, 1869; and the special tax, resulting from said vote, was not even levied until June, 1870. And so the appellees say, that no action had been had, equivalent or analogous to the subscription or taking of stock, by or in the name of the said township, until after June, 1870; and the alleged change in the boundaries of said township had been made in the preceding September.

"Upon the whole case, the appellees respectfully submit that the decision of the court below, in sustaining their demurrer to appellants' complaint, was correct, and that the

judgment there rendered should be affirmed by this honorable court."

Counsel for appellants in their supplemental brief assume the following positions:

"We insist that upon this state of facts the tax has become illegal, if it was not illegal when the levy was made. The only question upon which appellees' counsel and ourselves differ is as to the significance of the vote in favor of the appropriation, and the materiality of the place where the road is located and actually built.

"We maintain that the vote of the people of White River township was only an authority to their agents, the board of commissioners of Gibson county, to assess and collect a tax to be applied when collected in aid of the construction of a railroad in or through their township, as it then existed, and not in or through their township as it might exist at some future day. The appellees, on the contrary, insist that the letter and spirit of the statute is complied with, if the road is located and built in or through the township as its boundaries may exist at the time of the assessment. We contend that the location and construction of the road related back to the vote, and must conform to it. They insist that the assessment, and not the vote authorizing it, is the principal thing, and that if the road as constructed passes in or through the township as its boundaries existed when the assessment was made, the appropriation is earned and the payment of the tax should be enforced.

"Our associate counsel very properly show in their original brief for the appellants, that the question is analogous to that of a subscription to a railroad company, conditioned that the road shall be located or built within certain limits or boundaries.

"In such case it is admitted that the subscription cannot be enforced without a performance of or compliance with the condition.

"The appellees' counsel, in their brief, say, the vote given by 'White River township in favor of the railroad appro-

priation was not, and could not be, under the railroad aid act or the state constitution, a subscription by said township to the capital stock of said railway company, either conditional or otherwise. The power to make the subscription or to take stock in such railroad company, as it is expressed in the 14th section of the railroad act, is not conferred by said act until after the assessment or some part thereof has been collected.' We submit that this argument does not tend to weaken the force of the analogy between this case and a conditional subscription. True, a popular vote authorizing, first, an assessment, second, a collection, and, third, a subscription, is not itself a subscription. Nor if A. gave B. power of attorney to subscribe stock for him on a given condition, would the power be a subscription, and yet, if B. in execution of the power subscribed the stock with the required condition annexed, the railroad company receiving the subscription could not evade the performance of the condition by saying a power of attorney is not a subscription. In the case just supposed, it would be equally out of the question for B. to waive the condition or modify it in the smallest particular, without the consent of his principal. Here the vote of White River township was the power of attorney which authorized the board of commissioners as its agent, first, to levy, second, to collect the tax, and, third, to apply the proceeds by donation or subscription to the construction of the road in aid of which the vote was taken. But the law authorizing the vote itself annexed the continuing condition that the road for which the tax might be assessed and collected and to the construction of which it might be applied must be a railroad in or through White River township. Here the agent of the tax-payers of White River township, namely the board of commissioners of Gibson county, by a little sharp practice, after the receipt of their warrant of attorney, attempted to modify the condition upon which they were authorized to act, by substituting Patoka township for White River township, as the route of the road. This is clearly in substance and effect what

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that board did by changing the boundaries of White River township after the vote was taken, and then attempting to make that act of their own, instead of the vote, the basis of the assessment. If the boundaries of White River township still remained as they were when the vote was taken, no one would pretend that any tax could be assessed or collected; for the simple reason that the road is already constructed through Patoka township without passing into or through White River township. If, after the vote, the board of commissioners can, by their own act without consulting the tax-payers of White River township, assent to a change of the route of the road, there is no sense or propriety in submitting the question to a vote at all.

“The appellees make a point of the fact that the taxes have not been paid, and the inference seems to be, from what they say, that the tax must be collected, and then, if the proceeds cannot be legally applied to the construction of this road, the application of the taxes may be enjoined. We say that the New Albany and St. Louis Air Line Railway Co. has exhausted its power so far as the territory of White River township is concerned, by building its road without the limits of said township; that the assessment, if made after the construction of the road, was itself illegal; but if the road was located and constructed on its present route after the assessment was made, then it became certain by such location and construction of the road that the tax could never be legally applied to the building of the road, it became illegal to collect the tax, and its collection should be enjoined. The court will not permit the tax to be forced from the pockets of the people of White River township to be returned again to them because of the failure of the object for which it was collected. By an act supplemental to the railroad aid act, approved January 30th, 1873, it is provided,

“1. That no tax voted for by any township or county under the original act of May 12th, 1869, shall be placed upon the duplicate of any county until the railroad, in aid of which it

was voted, shall have been permanently located in the county or township making the donation or taking the stock.

"2. That the collection of the tax shall, in certain cases provided for in the act, be suspended until the road is permanently located in the county or township, and has expended an amount of money equal to the amount of money to be donated to, or stock taken in, such railroad company by such county or township.

"Here the railroad never can be constructed in or through the township by which the vote was cast, and therefore the collection of the tax ought to be enjoined.

"The appellees contend that the theory of our railroad aid act is 'at counties and townships, not territorially, but as bodies politic and corporate, are always benefited by the construction and use of railroads into and through their territorial limits, by the value of the peculiar property of railroads and by the invariably increased valuation of other property, for the purposes of taxation; and inasmuch as these results have always followed the construction and use of railroads, inasmuch as these enterprizes have invariably benefited the general public of the counties and townships into and through which railroads run, the law has wisely provided that counties and townships, in their corporate capacities, may raise money by taxation and use the same in aid of the construction of railroads by taking stock in, and making donations to, railroad companies.' From what source the appellees derive their knowledge of the theory of the railroad aid act we are not advised, but as the act itself requires the railroad that receives aid from the county or township to pass in or through the territory of such county or township, it would seem that more consideration was given to the territorial advantages to be derived than any other.

"Farms have a territorial, and not an ideal or corporate existence, and it is not unreasonable to suppose that one of the advantages to be derived by the construction of a railroad in or through a county or township would be the

increased facilities afforded for carrying to market the products of the farms, mines, and forests within such county or township.

"If corporate benefit is the chief thing, why allow townships to vote at all distinct from the county? Why not let the people of the county as a whole decide for all townships. The fact that each township may, under the law, vote aid to any road that shall pass in or through its borders shows that territorial advantage received paramount consideration. Again, if corporate advantage is the chief consideration, why is it that townships in their corporate capacities are not allowed to do anything in the matter of authorizing, assessing, collecting, or applying the tax? The people in their capacity as citizens or voters authorize the tax, the county treasurer collects, and when collected the board of commissioners decide whether they will subscribe stock for the township or donate the proceeds of the tax to the railroad company, in aid of the construction of whose road it was collected. From the beginning to the end of the matter, the corporate authorities of the township are ignored, and yet the appellees insist that corporate advantage, if not corporate exaltation, lies at the basis of the theory of the law.

"We cannot join in the appellees, eulogium on the wisdom of this law, which authorizes a majority of the members or citizens of a municipal corporation to vote upon the minority, against the will of the latter, a municipal tax, not for municipal purposes, but for extra-municipal or non-municipal purposes.

"It is the fashion now to eulogize such perversions of the taxing power, but that fashion is passing away, and unless we misinterpret the signs of the times, the day is not far distant when municipal taxation will be confined to municipal purposes in all the States by appropriate constitutional limitations."

We have duly considered the positions assumed and carefully weighed the arguments offered by opposing coun-

sel; and we have arrived at the conclusion that the assessment can not be sustained.

The first, second, and twelfth sections of an act to authorize aid to the construction of railroads by counties and townships taking stock in, and making donations to railroad companies, approved May 12th, 1869, read as follows:

"SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That whenever a petition shall be presented to the board of commissioners of any county in this State, at any regular or special session thereof, signed by one hundred or more freeholders of said county, asking said board to make an appropriation of money to aid a railroad company, named in such petition, then duly organized under the laws of this State in the construction of a railroad in or through such county, or whenever such a petition shall be presented to such board of commissioners as aforesaid, signed by twenty-five freeholders of any township of such county, asking such township to make an appropriation of money to aid a railroad company named in such petition, and then duly organized as aforesaid, in constructing a railroad in or through such township, by taking stock in or donating money to such company to an amount specified in such petition, not exceeding, however, two per centum upon the amount of the taxable property of such county or township, as the case may be, on the tax duplicate of the county, delivered to the treasurer of the county for the preceding year, it shall be the duty of such board of commissioners, after being satisfied that such petition has been properly signed by the requisite number of freeholders of such county or township, as aforesaid, to cause the same to be entered at full length upon their records.

"SEC. 2. The board of commissioners shall take said petition under advisement and thereupon order the polls at the several voting places of the county, or of the particular township, as the case may be, to be opened on a day to be named in the order, which shall not be less than thirty, nor

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more than sixty days thereafter, and the votes of the legal voters of said county, or of the particular township named in said petition, to be taken upon the subject of appropriating money by such county or by such township, for the purpose of aiding in the construction of such railroad as prayed for in said petition.

"SEC. 12. If a majority of the votes cast shall be in favor of such railroad appropriation, the board of county commissioners, at their ensuing regular June session, shall grant the prayer of said petition, and shall levy a special tax of at least one-half the amount specified in said petition, but not exceeding one per centum upon the real and personal property in the county or township, as the case may be, liable to taxation for state and county purposes, which tax shall be collected in all respects as other taxes are collected for state and county purposes; and if the sum so levied shall not be equal to the amount specified in said petition, then the residue thereof shall be levied by said board of county commissioners at the June session of the following year."

It is fully shown by the above quoted sections that the validity of an assessment in favor of a railroad is made to depend upon the will of the people to be affected thereby. No tax can be levied by the board of commissioners, unless a majority of the votes cast shall be in favor of the railroad appropriation. As the assessment depends upon the votes of the tax-payers, it should strictly correspond with their will. The theory upon which the law is based and supported is, that a majority of the voters of a county or township, by their votes cast in pursuance of the law, impose a tax upon themselves. It is therefore essential to the validity of any tax levied under the act in question, that a majority of the votes should have been cast for the proposition in aid of which the assessment is made. The question for our decision is, whether a majority of the voters of White River township agreed to impose a tax upon the property of the township to aid in the construction of the road, as it has been located and constructed. It is not disputed that a majority

of the voters of such township cast their votes in favor of aid in constructing a road through the township as it then existed, but it is manifest that no votes have been cast in favor of the road as it is located and constructed. Are we to presume that because the voters of such township were in favor of the construction of a railroad in and through the township as it was bounded at the time of the vote, they were and are in favor of its construction over and through territory that did not then belong to the township? We ought not, and can not indulge such a presumption. The location and construction of the road through the township as it existed at the time of the vote may have beneficially affected a majority of the voters. Such a location may have suited the convenience, and increased the value of the property, of a majority of the voters, while its location and construction over and through the added territory may not have increased their facilities for travel or transportation of their products, or added to the value of the property which had to bear the increased burden of taxation. The citizens living upon the added territory never had the opportunity of voting upon the question. The citizens of the old township never voted in favor of taxing themselves to aid in building the road as constructed.

In *The Lafayette, Muncie, and Bloomington R. R. Co. v. Geiger*, 34 Ind. 185, in speaking of the vote provided for by such act, the following language is used: "Prior to the adoption of our constitution, the practice had been to submit the question to the vote of the people. The constitution is silent as to the mode of ascertaining the wishes of the people. The legislature has provided for a vote. This is an honest and fair mode of acting. The people should never be cheated or defrauded into taking stock in a railroad. If the question is fairly submitted to them, and they, with full knowledge that it is intended to subscribe for stock, impose the tax on themselves, they will have no cause of complaint against any person but themselves."

Garrigus v. The Board of Commissioners of Parke County,

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39 Ind. 66, held void a tax which had been levied in pursuance of a vote of the people of the county, upon the ground that the election had not been fair, because the voters were required to vote in favor of or against aid to two railroad companies. The court say, "that the plain and obvious purpose of the legislature, to be derived from the plain and unambiguous language of the act, was, that the voters of a county or township should have the privilege of voting for or against any proposition that might be submitted to them, without being compelled to vote for or against some other proposition that they would not have freely and of their own choice voted for."

The Supreme Court of Illinois, in the case of *Supervisors of Fulton County v. The M. & W. R. R. Co.*, 21 Ill. 338, in speaking of the fairness of a vote that had been taken upon a proposition to aid in the construction of a railroad, say:

"The truth is, the voters of Fulton have never had an opportunity to vote, and never have voted this subscription, for the question was at no time distinctly before them. The question before them was, will you vote for a subscription to two roads? Neither road has received the approving vote of the people, and until that is done, until the naked single question shall be fairly presented to those voters, they ought not to be bound, or injuriously affected, by any such jockeying management and log-rolling."

The same court, in the subsequent case of *The People v. The County of Taxewell*, 22 Ill. 147, say: "The vote resulting in favor of such subscription or purchase is necessary to authorize the county judges or city council to act, and is a limitation on the discretionary power conferred by the first section; as without such vote, they could not subscribe, whatever might be the desire of the citizens of the county or city."

The Supreme Court of Iowa, in *McMillan v. Lee County*, 3 Iowa, 311, in speaking of a vote under a similar law, say:

"Every proposition for the borrowing or expenditure of

money by a county, and for the levy of a tax to pay the same, receives its vitality as a law from the majority of the votes of the people cast in its favor. Such being the case, we think it is evidently the policy of the law, no less than its spirit and intention, that the vote of the people should be permitted to be cast for or against the propositions submitted, with no restraint upon the free expression of their choice."

The Supreme Court of Kansas, in *Leavenworth County v. Miller*, 7 Kansas, 536, say :

"In cases of local improvements, or improvements that confer local benefits, the best system for securing the rights of the locality to be taxed that has yet been tried, is to let the locality itself say how much the benefit is worth, and therefore how much it is willing to be taxed for it."

We have made these quotations for the purpose of showing the importance and sanctity attached to the vote of the people, and that no assessment will be sustained that is not authorized by the free and unrestrained voice of the people to be taxed.

The law in question is one which imposes a burthen upon the people, in some measure for the benefit of private corporations, though accomplishing a public purpose. It should not be construed beneficially for the corporation and against the tax-payer beyond its spirit and the true intent and meaning of the legislature. We think the true spirit and intent of the act require that the road should be built within the territory of the township as it existed at the time the vote was taken, because it must have been the understanding of the people that it should be there built when the vote was taken. Otherwise, their purpose in voting the tax may be defeated, and a tax imposed upon them for a purpose which they never contemplated. In this view of the law, we think the tax in question cannot be collected.

It is very obvious to us that the voters of White River township have not, by their votes, authorized the imposition of a tax to aid in the construction of the railroad where

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it has been located and constructed, and that the court erred in sustaining the demurrer to the complaint.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to overrule the demurrer to the complaint, and for further proceedings in accordance with this opinion.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1873, IN THE FIFTY-
EIGHTH YEAR OF THE STATE.

DAVIS ET AL. v. STATTS.

43 103
152 375

PRINCIPAL AND SURETY.—*Married Woman.—Promissory Note.*—Where there is no fraud, duress, deceit, or violation of law or public policy on the part of the payee, in procuring the execution of a promissory note, the sureties of such note are liable, although the principal be not; as where the principal is a married woman.

From the Wayne Common Pleas.

J. B. Morris, for appellants.

L. D. Stubbs, for appellee.

PETTIT, J.—This suit was brought by the appellee, Statts, against William M. Davis, Milton L. Davis, Daniel C. Rich, and Esther A. Rich, on the following note:

“\$898.00. March 18th, 1872. Ninety days after date, we promise to pay to the order of Oliver P. Statts eight hundred and ninety-eight dollars, value received, waiving valuation and appraisement laws, drawing interest at the rate of six per cent. Esther A. Rich, William M. Davis, Daniel C. Rich, Milton L. Davis.”

The complaint was in the usual and proper form. Esther A. Rich answered, that at the time of giving the note, she was a married woman, and that she still continued such married woman, which facts were known to the payee of the note. This answer was demurred to for want of sufficient facts, which was overruled. From this time she was left out of the case, except that she had judgment for costs. The other defendants, Daniel C. Rich, Milton L. Davis, and William M. Davis, answered, that they "admit the execution of the note herein sued on, but say that the same is void, and that they are not liable on the same, for the reason and on account of the matters and things herein set forth. Defendants represent and say, that the said note was made and executed by defendant Esther A. Rich, as principal, and the said defendants Daniel C. Rich, Milton L. Davis, and William M. Davis signed said note as sureties to defendant Esther A. Rich, and that no consideration for the same moved to said sureties. All of which was well known to said plaintiff at the time he received said note. Defendants further say that at the time defendant Esther A. Rich made and executed said note, she was and still is a married woman, and living with her husband, and had never been authorized by any court to contract; and plaintiff well knew at the time he accepted said note that said defendant Esther A. Rich was a *feme covert*, and that the consideration for the same moved to said principal."

To this answer, a demurrer, for want of sufficient facts, was sustained, and these three defendants failing and refusing to answer further, judgment was rendered against them for the amount of the note.

This case presents the sole and only question as to whether the sureties of a married woman, who is not herself liable, on a promissory note, are liable to the payee, all parties, payee, principal, and sureties, knowing that the principal was not liable. We hold that the sureties are liable on such note, where there is no fraud, duress, deceit, violation of law or public policy, on the part of the payee, in procuring said

The State, *ex rel.* Lockhart, *v.* Hauss.

note, and the following authorities fully sustain this ruling: *Harris v. Huntbach*, 1 Bur. 373; Addison Contracts, 37; Chitty Contracts, 10 Amer. edition, 547; 2 Parsons Contracts, 4; *St. Albans Bank v. Dillon*, 30 Vt. 122; *Kimball v. Newell*, 7 Hill N. Y. 116; *Smyley v. Head*, 2 Rich. 590; *Whitworth v. Carter*, 43 Miss. 61; *Jones v. Crosthwaite*, 17 Iowa, 393; *Stillwell v. Bertrand*, 22 Ark. 375; 1 Parsons Notes & Bills, 244.

The appellants cite and put great stress on the case of *Osborn v. Robbins*, 36 N. Y. 365, and similar cases, to sustain their view of the question, that a surety is not liable further than the principal, and that whatever discharges the principal discharges the sureties. That case is one in which the note was procured by duress, in violation of law, and contrary to public policy, morality, and justice; and it can have no weight, or be an authority, in the case before us.

The judgment below is in all things affirmed, at the costs of the appellants.

43	105
165	180

THE STATE, EX REL. LOCKHART, *v.* HAUSS.

OFFICE.—*Resignation of.*—A written resignation of an office, to take immediate effect, when transmitted by the officer to, and received by, the officer or authority appointed to receive it, cannot be withdrawn, and there is then a vacancy in the office.

SAME.—*Sheriff.*—A written resignation of the office of sheriff, to take immediate effect, cannot be withdrawn after it has been received by the governor, even with the governor's concurrence.

From the Gibson Circuit Court.

D. F. Embree and *A. C. Donald*, for appellant.

C. A. Buskirk and *O. M. Welborn*, for appellee.

OSBORN, J.—The relator of the plaintiff claims to be sheriff of Gibson county. The appellee is in possession of the

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office. The information is prosecuted for the purpose of excluding the appellee from the office, and to require him to surrender it to the relator. A demurrer was sustained to the complaint. Proper exceptions were taken, and the errors assigned raise the question of the right to the office.

The complaint states substantially that the relator was elected sheriff of Gibson county, at the October election, 1870, received his commission, was duly qualified, and entered upon the discharge of his duties. On the 16th of June, 1871, he tendered his resignation of the office in writing, and forwarded it to the Governor by mail, by whom it was received on the next day. He also filed in the office of the auditor of the county of Gibson a written notice, addressed to the board of commissioners of that county, informing the board that he had forwarded his resignation to the Governor, to take effect from that date. On the 16th day of June, and before the Governor had received the resignation, the auditor issued a notice to the commissioners to meet in special session on the 19th day of the same month. Before the commissioners met, under the call, the relator determined to retain the office and not resign, and before his notice to the board had been presented to or laid before them, as a board, he did, on the day fixed for their meeting, inform the auditor and one of the commissioners that he had withdrawn his resignation and notice, and did on the same day by telegraph to the Governor withdraw his resignation, in which withdrawal the Governor concurred. The commissioners met and appointed the appellee sheriff, who qualified, entered upon the discharge of the office, and claims to and does actually deprive the relator of the same.

It is claimed by the appellant that the relator had a right to recall his resignation at any time before it was accepted, and even after that, by the consent of the Governor, when no new rights had intervened. *Biddle v. Willard*, 10 Ind. 62, is relied upon to sustain the position. That was the case of a prospective resignation, and it was in reference to such a resignation that the remark was made by the judge, which

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is relied upon in this case. On page 66, he says: "Hence, a prospective resignation may, in point of law, amount but to a notice of intention to resign at a future day, or a proposition to so resign; and for the reason that it is not accompanied by a giving up of the office—possession is still retained, and may not necessarily be surrendered till the expiration of the legal term of the office, because the officer may recall his resignation—may withdraw his proposition to resign. He certainly can do this at any time before it is accepted; and after it is accepted, he may make the withdrawal by the consent of the authority accepting, where no new rights have intervened."

In the case at bar, there was an actual, present resignation of the office, to take effect on that day, transmitted to, and received by, the officer to whom the law declares the resignation shall be forwarded (sec. 5, 1 G. & H. 246), and a notice given to the body authorized to fill the vacancy and appoint a successor. Sec. 8, same vol. and page. He had, thus, in the form and according to the rules prescribed by law, given up the office and renounced all further right to use it, and having once vacated the office by resignation, could not take it back again. *Yonkey v. The State*, 27 Ind. 236-41. The Governor could not and did not attempt to reinstate him in his office. The statute has designated the Governor as the officer to whom a sheriff shall transmit the resignation of his office. It nowhere confers upon him the power of permitting a withdrawal. He is appointed by law to receive the resignation. That, in the absence of any other authority or direction, implies a direction to retain and keep it.

Our conclusion is, that when an officer has transmitted his written resignation of an office to, and it has been received by, the officer or authority appointed by law to receive it, to take immediate effect, he cannot withdraw it, and that there is a vacancy to be filled by the proper authority.

The judgment is affirmed, with costs.

Jenks v. Opp, Adm'r.

JENKS v. OPP, ADMINISTRATOR.

WITNESS.—Competency.—Administrator.—Parties.—Promissory Note.—In an action by an administrator upon a joint promissory note executed to his decedent by two defendants, of whom one has been served with process, and the other has not been served, as to whom a return of “not found” has been suggested and the cause continued, the defendant not found remains a party to the action, and is not a competent witness, under the statute, unless required to testify by the administrator or the court trying the cause.

SAME.—Discharge in Bankruptcy.—Pleading.—Where the obligation is joint, all the makers are necessary parties to an action thereon; and though one of the joint makers of a promissory note may have received a discharge in bankruptcy, yet such a discharge being a personal privilege which must be pleaded, he is a necessary party to the action on the note.

From the Tippecanoe Common Pleas.

H. W. Chase and *J. A. Wilstach*, for appellant.

F. B. Everett, for appellee.

BUSKIRK, J.—This was a suit by Opp, administrator of Porter, against James W. Moliere as principal, and Edward T. Jenks as his surety, upon three joint promissory notes, made in 1866 to the intestate, all payable with ten per cent. interest, and the last maturing in March, 1867.

The appellant, Jenks, was alone served with process, which was returned not found as to Moliere. An appearance was entered for Moliere by mistake, and an answer filed; but, by leave of the court, the appearance was withdrawn, and his answer was stricken out, and the suit continued as to him.

The appellant answered, 1. By a general denial. 2. That payments were made from time to time upon the notes, under the name of interest, at the rate of twenty-four per cent. per annum, being usury corruptly contracted for and paid; and that other payments were made, a schedule of which payments is filed, showing such payments in all to be twenty-five hundred dollars, a sum more than sufficient to pay the notes in full with ten per cent. interest.

A reply in denial of the second paragraph of Jenks' answer was filed.

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The appellant then presented an affidavit and made a motion for a continuance, which was overruled; and a trial was then had, which resulted in a judgment for the appellee against the appellant for thirteen hundred and sixty-three dollars, over the appellant's motion for a new trial.

The affidavit for continuance is set out in the bill of exceptions, and the ruling of the court upon it presents the only point there is in the case.

The affidavit, which is in the form contemplated by the statute, states that Moliere, the principal in the notes, was a material witness for the affiant; that since the making of the notes, Moliere has been adjudged a bankrupt, under the act of Congress of March 2d, 1867, by the United States District Court for the District of Michigan, and that the notes were barred as to him; that as soon as process was served on affiant, he commenced investigations to ascertain Moliere's residence, and that a day or two before the term of court commenced, affiant learned that Moliere had removed from his former residence at Dowagiac, Michigan, to Kalamazoo, in that State; that it was then too late to take his deposition or procure a certified copy of the bankruptcy proceedings, to show his competency as a witness; that as soon as Moliere's residence was ascertained, affiant went to Kalamazoo and saw Moliere, who promised to come to Lafayette as a witness; but affiant received a letter from him, on the day he was to have arrived, stating that he was sick and unable to come; that affiant believed that over the sum of eight hundred dollars of said notes was for usurious interest, and that Moliere could prove that over two hundred dollars of the same was usury, but just how much affiant could not state; and that there was no other witness by whom the facts could be proved, and that Moliere could be obtained by the next term, if the cause was continued.

The court overruled the motion, because, as the record states, "said Moliere, although adjudged a bankrupt, since the making of the notes described in the complaint, and

Jenks v. Opp, Adm'r.

discharged therefrom, is not a competent witness for the defendant Jenks."

The statute upon the subject, which was construed by the court as excluding the testimony of Moliere, reads as follows:

"*Provided*, That in all suits where an executor, administrator or guardian is a party in a case where a judgment may render" [may be rendered] "either for or against the estate represented by such executor, administrator or guardian, neither party shall be allowed to testify as a witness unless required by the opposite party, or by the court trying the cause." 3 Ind. Stat. 561.

The only question in the case is, was the refusal of the court to continue the cause, for the reason stated, correct?

It is claimed, by counsel for appellant, that because Moliere has been discharged under the bankrupt law, he has no interest in the suit and is therefore a competent witness for his surety upon the notes.

Under our statute, the competency or incompetency of a witness is not made to depend upon his interest in the suit. All persons, even parties, are, as a general rule, competent witnesses. To this general rule the statute has made certain exceptions; and one of them is, that in all suits where an executor, administrator, or guardian is a party, where a judgment may be rendered either for or against the estate represented, neither party shall be allowed to testify, unless required by the opposite party, or the court trying the cause.

This certainly is a suit by an administrator, and a case where a judgment might be rendered either for or against the estate represented. Moliere was made a defendant, but was not served. Was he a necessary party defendant? The action was based upon three joint promissory notes. Where the obligation is joint, all the makers are necessary parties; and, in this case, Moliere was not only a proper but a necessary party.

But it is insisted that he was not a necessary party, because he had been adjudged a bankrupt. A discharge in

Jenks v. Opp, Adm'r.

bankruptcy does not, *per se*, operate as a discharge of all his debts. The courts do not take judicial notice of discharges in bankruptcy. A discharge in bankruptcy must be pleaded, otherwise a judgment may be rendered against an adjudged bankrupt. It is a personal privilege, which the bankrupt may or may not set up as a defence to the action. The note of a married woman is void, yet, if when sued she fails to set up her coverture, a valid judgment may be rendered against her.

We think that Moliere was, by the express words of the statute and its spirit, an incompetent witness. The note sued upon was a joint, and not a joint and several obligation. There was a suggestion upon the record of not found and a continuance as to him. As between Moliere and Jenks, the relation of principal and surety existed; but as between them and the payee, they were both principals. The appellee having sued both the joint obligors, taken process against both, suggested upon the record a return of not found, and continued as to Moliere, and taken judgment against Jenks, he may proceed under section 641 of the code and have Moliere bound by the original judgment. *Erwin v. Scotten*, 40 Ind. 389.

In such proceeding the judgment, if any, would be that Moliere should be bound by the original judgment. If he should testify for the appellant, he would, in legal effect, testify for himself. The plaintiff having caused a suggestion of not found to be entered on the record, and taken a continuance as to Moliere, the rendition of a judgment against his co-obligor did not merge the cause of action in the judgment. If the plaintiff had dismissed as to Moliere and taken judgment against Jenks, the obligation being joint, the cause of action against Moliere would have been merged in the judgment, and he would have ceased to be a party within the meaning of the statute. *Erwin v. Scotten, supra*. Moliere being a party to the action at the time he was offered as a witness, and the action being by an administrator, it results that he was an incompetent

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witness, and that the court committed no error in refusing to continue the cause.

The judgment is affirmed, with costs.

PETTIT, J., having been of counsel, was absent.

BIGLER v. REYHER.

43	112
136	443

43	112
151	679

43	112
154	34

43	112
158	421

EVIDENCE.—*Confidential Communications.—Attorney and Client.*—A party, having given evidence in chief in his own behalf, cannot, on cross-examination, be compelled to divulge statements made by him when consulting, as a client, an attorney at law.

SAME.—Communications made in consultation by a client to his attorney are privileged and protected from inquiry, when the client is a witness, as well as when the attorney is a witness.

SAME.—Statements made by a client to his legal adviser are privileged, though no action is at the time pending or contemplated concerning the matter of which such statements are made.

From the Noble Common pleas.

A. A. Chapin and *V. C. Mains*, for appellant.

L. E. Goodwin, for appellee.

DOWNEY, C. J.—This was an action by the appellee against the appellant for the taking and conversion of goods. The issues are not material. On the trial of the cause, the appellee was a witness in his own behalf, and having given his evidence in chief, he was asked by Vincent C. Mains, Esq., attorney for the defendant, on cross-examination, if he did not immediately, when the goods in question were taken, or shortly afterward on the same day, tell said Vincent C. Mains that he had traded said goods to the defendant for a note; to which question counsel for the plaintiff objected, on the ground that, if any such statement was made, it was made to said Mains as a confidential communication, while

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counselling with him as an attorney at law. The plaintiff then testified that he did have a conversation with said Mains, but that when he did so he was consulting him as an attorney as to the validity of said note. It was admitted by the defendant that Mains was at the time a regularly admitted and practising attorney of that court. The defendant still insisted on asking the said question, but the court refused to allow it to be asked or to require the plaintiff to answer the same. The court having found for the plaintiff, the defendant moved the court for a new trial, on the ground that the said ruling of the court was erroneous. This motion was overruled, and final judgment was rendered for the plaintiff. The error assigned in this court is the overruling of the motion for a new trial.

It may be gathered from the arguments of counsel that the appellant contends that when the plaintiff made himself a witness in the cause, he thereby made it proper for the adverse party to inquire of him with reference to any conversation which he might have had, which it would be proper to inquire into on cross-examination, although such conversation would be, under other circumstances, regarded as confidential. It is insisted that by testifying as a witness for himself, he becomes bound to divulge on cross-examination every conversation which he may have had, without regard to its confidential character, or the person to whom it was made, if it was such a conversation as would under other circumstances be the subject of a cross-examination. It is claimed that the exemption never was accorded to the party himself when a witness, but only to his attorney; that while the party might object to the attorney testifying to such communications, the exclusion was applied only to the attorney. Another ground taken is, that the bill of exceptions does not show that the relation of attorney and client existed between the appellee and Mains; that there is nothing shown which would even prevent Mains from testifying to the conversation in question; that while it appears that the

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conversation was with Mains about a note, it does not appear that the statement was made with reference to any legal advice about a suit then pending or expected to be commenced; that it is simply an independent statement of a fact made in the course of conversation.

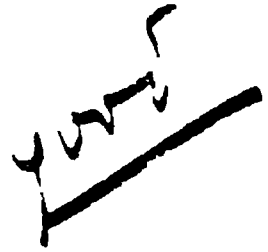
We think the evidence shows sufficiently that the relation of attorney and client existed between the appellee and Mains. It is not necessary that an action should have been pending or in contemplation, in order to make the communication confidential in its character, and to extend to it the protection of the rule. Counsel are often consulted about matters of great importance out of which it is not expected that any suit will ever arise. Indeed, the advice and assistance of counsel are in many instances invoked for the purpose of more certainly guarding against litigation. It seems to be settled in this State, and indeed generally, that the pendency or expectation of litigation is not essential in order to give the communication its confidential character. *Bowers' Adm'r v. Briggs*, 20 Ind. 139; *Borum v. Fouts*, 15 Ind. 50; 1 Greenl. Ev., sec. 240.

In the case of *Oliver v. Pate*, *post*, p. 132, the question arose whether the attorney, who acted as prosecuting attorney, could be examined with reference to a conversation between him and the defendant, in an action for malicious prosecution, concerning the commencement of the criminal prosecution on which the civil action was founded, and it was held, with some hesitation however, that as the defendant in the action had made a witness of himself, and had himself testified to the matter which would otherwise have remained in confidence, he could.

We are now asked to hold that when a party is a witness in his own behalf, he shall be compelled to testify to any and all conversations which he has had with his attorney, concerning the matter in question. The case of the *Inhabitants of Woburn v. Henshaw*, 101 Mass. 193, is cited as authority. The court in that case say: "The objection, that the defendant was wrongfully compelled to undergo

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cross-examination as to what he said to his counsel, cannot be sustained. The policy of the law will not allow the counsel himself to make disclosures of confidential communications from his client; but if the client sees fit to be a witness, he makes himself liable to full cross-examination like any other witness." This ruling does not commend itself to our judgment. The rule excluding these communications is for the benefit of the client and not the attorney, and the protection from disclosure extends to the client as well as to the attorney. But it is supposed that because the party entitled to the protection becomes a witness in his own behalf, therefore he obliges himself upon a cross-examination to reveal the confidential communication, on the ground that he is bound to testify fully to all that he knows concerning the matter in question. We do not doubt but that he must testify to all the material facts in his knowledge. But statements made by him to his legal adviser are not so much facts as they are the evidence of facts. The statute of this State which makes a party a competent witness in his own behalf has still kept up the protection of confidential communications. It is difficult to see why, if the fact that the party himself testifies removes the protection of the rule from confidential communications, it does not make the evidence of the attorney admissible also when the party is a witness, as well as that of the client on cross-examination. But in *Hemenway v. Smith*, 28 Vt. 701, the very opposite of what was held in Massachusetts is decided. It was there held, that a party is not obliged, as a witness, to disclose any consultation he may have had with his counsel in relation to the cause, and that he is equally protected, with his counsel, from testifying respecting confidential communications between them. In that case, like the one under consideration, the matter was sought to be brought out on cross-examination of the witness, who was made competent to testify by statute, as in this State. The court say: "The rule should be the same as it would have been if the counsel had been called to prove the consultation." The same



Lane *et al.* v. Kenworthy.

thing is decided in substance in *Bobo v. Bryson*, 21 Ark. 387. In our opinion, the ruling of the court below, in refusing to allow the cross-examination as to the communications of the appellee to Mains, was correct.

The judgment is affirmed, with ten per cent. damages and costs.

LANE ET AL. v. KENWORTHY.

PLEADING.—*Evidence.*—*Justice of the Peace.*—Under the general denial, in an action before a justice of the peace, on an account for goods sold and delivered, evidence may be given of payment, and that the goods, for the value of which the action is brought, were furnished on the order of a third person.

APPEAL.—Where the evidence is conflicting, the Supreme Court cannot, upon the evidence, reverse the judgment below.

From the Boone Circuit Court.

W. A. Tipton, D. E. Caldwell, W. B. Walls, J. E. McDonald, and J. M. Butler, for appellants.

PETTIT, J.—The appellants, Lane and Walls, brought suit against the appellee, Kenworthy, before a justice of the peace, on an account for goods sold and delivered. There was a trial by jury and verdict and judgment for the defendant, appellee. Appeal to the circuit court, where the case went to trial before a jury on a general denial, when there was a verdict, as before the justice, for the appellee. Motion for a new trial for the reason, "that the verdict of the jury is contrary to law and not sustained by the evidence." This motion was overruled, exception taken, and this ruling only is assigned for error. Before a justice of the peace, "all matters of defence, except the statute of limitations, set-off, and matter in abatement, may be given in evidence without

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plea." 2 G. & H. 585, sec. 34. On appeal, the cause may be tried under the same rules as before the justice. 2 G. & H. 596, sec. 67.

Evidence of payment, or that the goods were delivered on the order of a third person, could, therefore, be given under the issue formed, which was done without objection to its introduction. This evidence to some extent is contradicted, but under the often repeated rulings of this court, on conflicting evidence we cannot reverse the judgment of the court below.

The judgment below is affirmed, at the costs of the appellants.

48	117
166	655

PIGG v. PIGG.

PROCESS.—*Service.*—*Return.*—*Residence.*—Under a statute (2 G. & H. 582) requiring that summons shall be served by reading the same to the defendant "or leaving a copy thereof at his last usual place of residence," etc., a return of service "by copy left at the residence" of the defendant is sufficient.

From the Sullivan Common Pleas.

S. Coulson, for appellant.

BUSKIRK, J.—The only question arising in the record in this cause is, whether or not the return made by the constable on the summons issued by the justice of the peace shows a service sufficient to bring the defendant into court.

The return is as follows: "Served by copy, March 1st, 1870, left at the residence of Richard H. Pigg.

"PHILLIP HOUCK, C. C."

The record says that on the 2d day of March defendant appeared and called for witnesses in said suit to appear on the 5th day of March, 1870, at Center school-house.

Pigg v. Pigg.

The defendant appeared before the justice and moved to dismiss the suit because of insufficient service; the motion was overruled, and the cause was tried upon its merits, and a judgment was rendered for appellant, who was plaintiff below. From this judgment the appellee appealed to the court of common pleas, where the motion to dismiss was renewed and sustained by the court. To this ruling the appellant excepted and assigns for error this ruling.

The twenty-second section of the justices' act, 2 G. & H. 582, provides, that "such summons shall be served at least three days before trial, by reading the same to the defendant, or leaving a copy thereof at his last usual place of residence, and if not so served, such cause shall be continued for a reasonable time."

The above section is, in substance, the same as sec. 35 of the code, 2 G. & H. 60, which provides the manner in which summons from the circuit or common pleas courts shall be served, and judicial constructions of such section will apply with equal force to the section under examination.

Were the service and return, in the present case, sufficient? The return shows that the summons was served by leaving a copy at the residence of the defendant. The statute provides, that "the summons shall be served either by reading to the defendant or leaving a copy thereof at his last usual place of residence." It is provided by section 35, *supra*, that "the summons shall be served, either personally on the defendant, or by leaving a copy thereof at his usual or last place of residence."

This court, in *Sturgis v. Fay*, 16 Ind. 429, defined the meaning of the phrase "at his usual or last place of residence." The court say: "The usual or last place of residence, means the residence into which the person, still a resident of this State, has moved, in this State, last before the service of the process. This requirement secures the service at the actual residence of the defendant, in this State, at the time of the service."

The meaning of the statute is, that the copy shall be left

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at the actual residence of the defendant, in this State, at the time of the service. As we have seen, the usual or last place of residence means the actual place of residence. When the return shows that the copy was left at the residence of the defendant, it sufficiently shows that it was left at his usual and last place of residence, because no person can have two places of residence at the same time.

It was held by this court, in *Campbell v. Swasey*, 12 Ind. 70, and *Sturgis v. Fay*, 16 Ind. 429, that a return was sufficient which showed that the summons had been served by leaving a copy at the residence of the defendant.

These cases are directly in point.

We think the court erred in dismissing the action, for which the judgment must be reversed.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to overrule the motion to dismiss, and for further proceedings in accordance with this opinion..

FENSLER v. PRATHER.

43	119
126	13
43	119
129	570
43	119
131	341

PARTNERSHIP.—Part Payment by one Partner.—Effect of.—Consideration.—

Principal and Surety.—Two partners, owing debts and having assets, dissolved partnership, and, by agreement, one partner was to retain all the assets, and pay all the debts, and manage and close up the business. The partner who had withdrawn from the management of the business, desiring a discharge from further personal liability on a certain note made by said firm and held by one of the creditors thereof, acquainted such creditor with the facts of the partnership arrangement, and proposed to pay him one-half the amount of said note, the creditor to relieve him from further liability and look to the effects in the hands of the former partner and to such partner personally for the other half; which proposition the creditor accepted, and one-half the amount of said note was then paid accordingly.

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Held, that such part payment was not a sufficient consideration for the promise to release the party making it as to the remainder.

Held, also, that the arrangement between the partners and the part payment of the note did not so change the relations between the former partners as to make the one who made part payment a surety for his former partner for the payment of the residue, so as to bring them within the provisions of the statute, secs. 672, 673, pp. 306, 307, 308, 2 G. & H. To enable a party to proceed under that statute, it may be laid down as a general rule that he must have been a surety at the inception of the contract.

Held, also, that if the statute governing principals and sureties did apply, a notice from the surety to the creditor, that "if you think" such surety "in any way liable, you will take notice to proceed accordingly and legally," did not conform to the statute, so as to require the creditor forthwith to sue on the note.

From the Bartholomew Common Pleas.

W. W. Herod and *F. Winter*, for appellant.

S. Stansifer, for appellee.

DOWNEY, C. J.—This was an action by Fensler, the appellant, against Prather, the appellee, and one Valhowe, upon a promissory note executed by the defendants, as partners, in their firm name of Prather & Valhowe, to Fensler. Valhowe having become bankrupt, the action as to him was dismissed, and therefore no further notice of him as a party need be taken.

Prather answered as follows: 1. Payment.

"2. That after the execution of said note, defendants dissolved their said partnership, and by the terms of the dissolution, said Valhowe retained all outstanding liabilities in favor of said firm, and was to collect them and apply the proceeds of collections to the payment of the outstanding liabilities of the firm, including said note, and if there was a deficiency of assets to pay the debts, this defendant was to contribute his portion, and if an excess, said Valhowe was to account to this defendant for his portion of the excess. Thereafter, on the day of the date of the payment endorsed on said note, this defendant, being desirous of a discharge from further personal liability on said note, and acquainting plaintiff with the facts herein set forth, proposed to plaintiff to pay him one-half of said note, if he would release and discharge

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him from further liability upon the note, and look to said effects in the hands of his co-defendant and to him personally for the residue; which proposition plaintiff then accepted, and defendant paid him the one-half of said note, which is the same indorsed on said note.

"3. After the execution of said note, defendants dissolved their said partnership, and by the terms of the dissolution, this defendant was to pay one-half of said note, and said Valhowe the other half; and thereafter, on the 8th day of August, 1868, this defendant paid his half of the note, which is the same payment indorsed thereon; and thereafter, to wit, on the — day of —, 1868, the plaintiff being aware of said agreement, this defendant served a written notice on plaintiff to forthwith sue on said note, which the plaintiff failed and refused to do until the commencement of this action, which was on the 11th day of September, 1871.

"4. After the execution of said note, this defendant and said Valhowe dissolved said partnership, and by agreement between them, said Valhowe retained all outstanding debts and liabilities in favor of the firm, and was to collect the same and pay all debts against the firm, including said note, and if there was a deficiency of partnership assets, this defendant was to contribute his portion of the deficiency, and if an excess, said Valhowe was to account to this defendant for his portion; and with the payment made on said note by this defendant hereinafter mentioned, and with other moneys contributed by this defendant on account of said debts and liabilities, all of his private funds, said debts and liabilities that were available, so retained, were amply sufficient to pay all debts and liabilities against the firm. On the 8th day of August, 1868, this defendant paid the said plaintiff one-half of said note, which is the payment endorsed thereon; and thereafter he served a written notice on plaintiff, who was not ignorant of the foregoing arrangement and agreement between this defendant and said Valhowe, to forthwith sue on same, which he failed and neglected to do

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until the —— day of September, 1871, when this action was commenced.”

The plaintiff demurred separately to the second, third, and fourth paragraphs of the answer; the demurrers were each overruled, and he excepted. He then closed the issues by a general denial of all the paragraphs of the answer. There was a trial of the issues by a jury, a verdict for the defendant, a motion for a new trial overruled, and judgment on the verdict.

The errors assigned in this court are the overruling of the several demurrers to second, third, and fourth paragraphs of the answer, and the refusal to grant a new trial.

The second paragraph of the answer relies upon the payment by Prather of part of the debt, all of which was due at the time, as a consideration for his discharge from the payment of the residue. This is not a sufficient consideration to support the promise to release him. *Shook v. The Board of Comm'rs, etc.*, 6 Ind. 461; *Halstead v. Brown*, 17 Ind. 202; *Kingan v. Gibson*, 33 Ind. 53. Payment of a smaller sum in satisfaction of a greater liquidated debt only operates as a discharge *pro tanto*, and cannot in law discharge the whole debt without some valid consideration for abandoning the residue. But payment of a smaller sum may amount to a discharge of a larger debt, where it is made under a valid agreement to that effect; as where it is agreed to be paid at an earlier day, where it is agreed to be paid by a third party, or where it is paid as a composition for the debt under an arrangement between the debtor and his creditors. Payment of a smaller sum in satisfaction of a larger amount claimed for an unliquidated demand may operate as a valid discharge; so payment of a smaller sum, under an agreement to abandon a defence to an action and pay costs, may be pleaded in satisfaction of a larger demand. A negotiable security for a smaller amount given and accepted in satisfaction of a larger debt will operate effectually in discharge of it. *Leake Law of Con.* 474, 475.

The third and fourth paragraphs are in substance the same,

and their sufficiency must be determined by the same rule. They each allege in substance that upon a dissolution of the co-partnership between the makers of the note, Valhowe was to collect the assets of the firm and pay its debts, Prather agreeing to pay his share of any deficit; that the said assets were available and sufficient to pay the debts of the firm; that on the 8th day of August, 1868, which was after the maturity of the note, Prather paid the plaintiff, who was aware of his agreement with Valhowe, one-half of the amount of the note sued on, and thereafter served on the plaintiff a written notice to forthwith sue on the note, which he did not do until he commenced this action. The question here is, did this arrangement between the makers of the note, and the payment of one-half of the amount of the note by Prather, bring the case within sections 672, 673, pp. 306, 307, and 308, 2 G. & H.? The first of these sections reads as follows: "Any person bound as surety upon any contract in writing for the payment of money, or the performance of any act, when the right of action has accrued, may require, by notice in writing, the creditor or obligee forthwith to institute an action upon the contract."

The other section is as follows: "If the creditor or obligee shall not proceed within a reasonable time to bring his action upon such contract, and prosecute the same to judgment and execution, the surety shall be discharged from all liability thereon."

The right of a surety thus to require the creditor to sue on the contract, or if he do not the surety will be discharged, is statutory, and it is right that it shall only be exercised in those cases which come fairly within the statute. *Halstead v. Brown, supra*. We think it may be laid down as a general rule, that to entitle a party to proceed under the statute in question, he must have been a surety at the inception of contract. We will not say that the rule may not have exceptions, but none occur to us now. The language of the statute as to the persons who may have the remedy is, "any person bound as surety upon any contract in writing,"

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etc. The contract here referred to is intended to be the original contract by which the parties became bound to the payee or obligee, and not a subsequent contract between the principal makers of the instrument, to which the payee or obligee is not a party. It means a contract by which the surety is bound to the payee or obligee as surety, and not one in which he was and is bound to the payee or obligee as one of the principal joint makers or obligors in the contract. Such, we think, is the clear sense of the language used.

We are of the opinion, therefore, that the third and fourth paragraphs of the answer are also bad, and that the demurrers to them should have been sustained.

Among the reasons for a new trial, it was alleged that the court erred in admitting in evidence the notice which was served on the plaintiff by Prather notifying him to sue on the note. The notice is as follows:

"JONESVILLE, Ind., 24th February, 1870.

MR. FREDERICK FENSLER:

"Dear Sir, I feel that what I have paid on account of Reason W. Prather and Herman A. Valhowe, for money borrowed in business for firm of Prather & Valhowe, is fully paid as to Prather. Now if you think R. W. Prather is in any way liable, you will take notice to proceed accordingly and legally.

"Yours Respectfully,

"R. W. PRATHER."

This is not such a notice as is alleged to have been given in the third and fourth paragraphs of the answer. In the third, it is alleged that the notice required the plaintiff "to forthwith sue on the note." In the fourth, it is alleged that the notice was "to forthwith sue on the same." The statute says that the surety "may require, by notice in writing, the creditor or obligee forthwith to institute an action upon the contract." In *Kaufman v. Wilson*, 29 Ind. 504, the notice was as follows: "S. Kaufman, No. 219 East Washington street, Indianapolis, Indiana: Express Noland

& Co.'s note to Esquire Bennett, for collection, to-day. Don't fail. May 25th, 1867." Signed, "Josiah Wilson." The notice was sent by telegraph, and it was objected that this could not be done, and also that the surety could not require the creditor to sue before a justice of the peace. The court, however, without deciding these questions, held that the notice was insufficient. The court say: "It does not require the appellant to institute an action forthwith upon the contract or note, but to express it, that day, to Esquire Bennett for collection," etc. And, again, it is said: "It was not the province of Wilson to direct in whose hands the note should be placed for collection, but by notice in writing to require the appellant forthwith to institute an action on the note against the principals; and if he failed to do so in a reasonable time, Wilson, as the surety, would have been discharged. Such was not the notice given." So far as the language just quoted seems to mean that the notice should be to institute an action against the principals only, it may not be correct. But we think the court was correct in holding that the notice should require the creditor forthwith to institute an action upon the contract. In our judgment, the notice given by Prather to the plaintiff did not so conform to the statute as to require the plaintiff forthwith to sue upon the note, and that, had the case been one to which the statute applied, it would have been insufficient.

A question is made as to the correctness of certain instructions given by the court, and as to the sufficiency of the evidence, but we think it unnecessary in the present view of the case to examine and decide them.

The judgment is reversed, with costs, and the cause remanded, with instructions to sustain the demurrers to the second, third, and fourth paragraphs of the answer of Prather, and for further proceedings.

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SUPREME COURT.—*Appeal.*—*Within Three Years.*—*Reply.*—Where, on appeal to the Supreme Court, the appellee answered that the appeal was not taken within three years after the rendition of the judgment, an affirmative reply, the general denial being also filed, was wholly unnecessary, and was on motion struck out.

SAME.—*Appeal.*—*When Perfected.*—An appeal is taken to the Supreme Court when the transcript is filed in the office of the clerk; and where judgment below was rendered June 22d, 1868, and the transcript was filed in the office of the clerk of the Supreme Court June 20th, 1871, the appeal was taken within three years from the rendition of the judgment.

PRINCIPAL AND SURETY.—*Contribution.*—Complaint by A. against B. and C. for contribution, alleging that D., for the purpose of negotiating a loan from a bank in Lafayette, made his promissory note signed by himself as principal and said A. as surety, payable at a bank in New York; that D. presented said note to said B. and C., who severally, in order, indorsed it as accommodation endorsers thereon and as co-sureties with him, the said A; that A., B., and C. had not any actual interest in the note or the loan sought to be secured thereby; that it was signed by said A. and indorsed by said B. and C., to enable D. to procure a loan; that D. discounted and sold the note to the bank of Lafayette; that it was not paid at maturity; that the bank brought suit and recovered judgment against all the parties to the note; that execution was issued and levied upon the property of said A., and he was compelled to pay the judgment; that the principal maker was insolvent—

Held, that no action could be maintained by the indorsee of the note against B. and C. as co-sureties. The terms of the writing and the indorsement fixed the liability of each signer, so as to render it unchangeable by parol evidence in such action.

Held, also, that as between the parties who executed the paper before it had been negotiated or delivered by the principal, the real character of the transaction might be shown by parol.

Held, also, that the allegations in the complaint were sufficient to show the real character of the transaction and the liabilities of the parties to each other, and that an issue of fact could be formed between them, as to whether they were or were not co-sureties as averred in the complaint.

From the Clinton Common Pleas.

R. P. Davidson, for appellant.

L. McClurg and *J. N. Sims*, for appellees.

OSBORN, J.—This action was brought by the appellant to recover from the appellees contribution, on account of money

paid by him as a co-surety with them. A demurrer was sustained to the complaint and final judgment rendered on the demurrer. Proper exceptions were taken.

The error assigned is in sustaining the demurrer.

Two of the appellees, Armstrong and Douglas, filed an answer of the statute of limitations, in which they allege that the appeal was not, as to them, commenced and prosecuted within three years from the rendition of the judgment, to which the appellant filed a reply of two paragraphs:

1. The general denial.

2. That the judgment was rendered on the 22d day of June, 1868; that the transcript was filed in this court on the 20th day of June, 1871; that a notice of the appeal was issued by the clerk on the same day to the sheriff of Clinton county to be served upon the two appellees filing the answer, which was served upon them by the said sheriff, but never returned by him; that an *alias* notice was issued on the 11th day of May, 1872, and duly served and returned more than ten days prior to the first day of the then next term of this court. The answer and reply were filed on the 29th of May, 1872. On the 26th of November, 1872, Jackson and Douglas filed a written motion to strike out the second paragraph of the reply, and on the 27th of the same month, the appeal was submitted.

The appellees have not favored us with a brief, and the appellant has failed to cite any authority.

The second paragraph of the reply is entirely unnecessary. If the notice was issued as alleged, and the sheriff failed to return it, a rule might have been taken against him. If it had been lost, another could have been substituted and a proper return made to it, as and in the place of the original notice. The material question is, was the appeal taken within three years after the rendition of the judgment? The appellees filing the answer alleged that it was not. Evidence was admissible to show that the transcript was filed and the notice of the appeal issued within the three

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years, without replying it. The motion to strike out the second paragraph of the reply is sustained.

By the record, it appears that the judgment was rendered on the 22d day of June, 1868; the transcript was filed in the office of the clerk of this court on the 20th day of June, 1871; that on the same day, a notice of the appeal was issued by the clerk to Peter C. Somerville, one of the appellees, and that it was served and returned by the sheriff of Montgomery county. The clerk endorsed upon the back of the transcript the following: "Filed June 20th, 1871; two notices. Served on Somerville. 1872, May 11th, *alias* notice." A notice of the appeal to Somerville issued on the 20th of June, 1871, with a return by the sheriff of Montgomery county, showing service, is annexed to the transcript. That is all the evidence before us on the issue of the statute of limitations.

The statute requires that appeals in all cases tried after the revised statutes of 1852 must be taken within three years from the time the judgment is taken. 2 G. & H. 274, sec. 561. "Such appeals may be taken by procuring from the clerk of the court a transcript of the record, and proceedings in the suit, or so much thereof as is embraced in the appeal, and filing the same in the office of the clerk of the Supreme Court, who shall endorse thereon the time of filing, and issue a notice of the appeal to the appellee." 2 G. & H. 272, sec. 556.

If the appeal was taken by procuring and filing the transcript in the office of the clerk of the Supreme Court, then it was taken within three years from the rendition of the judgment. If the appeal was not taken until notice was issued by the clerk and delivered to the sheriff for service, it was not taken within the three years.

The issuing and delivery of the writ, not the filing of the complaint, is the commencement of an action. *Clark v. Redman*, 1 Blackf. 379; *Hancock v. Ritchie*, 11 Ind. 48, and cases cited. In *Evans v. Galloway*, 20 Ind. 479, it was taken

for granted that the same rule prevailed in appeals to this court, as in actions commenced in the *nisi prius* courts. The question was not material however, because the transcript was filed and notice issued in time. The language of the statute is, that "appeals may be taken by procuring from the clerk of the court a transcript of the record, * * * and filing the same in the office of the clerk of the Supreme Court, who shall endorse thereon the time of filing, and issue a notice of the appeal to the appellee." The statute is explicit, that the appeal may be taken by filing the transcript with the clerk. Then follow the directions or commands to the clerk to indorse the time and issue a notice.

The language of the act in relation to the commencement of actions in the lower court is entirely different. There, the action is commenced by filing a complaint and causing a summons to issue thereon, and the action shall be deemed to be commenced from the time of issuing the summons. 2 G. & H. 59, sec. 34. There, issuing the summons is essential to the commencement of the action. Here, the statute provides, that the appeal may be taken by filing the transcript. The notice which the clerk is required to issue is not essential to the appeal. It is to notify the appellee that the appeal has been taken.

Our conclusion is, that the appeal was taken when the transcript was filed, and that it was taken within three years from the rendition of the judgment.

It is alleged in the complaint that one John W. Blake, for the purpose of negotiating a loan of one thousand dollars from a bank in Lafayette, made his promissory note, signed by himself as principal and the appellant as surety, payable at sixty days to the order of the appellees at the Phoenix bank in New York, for that sum; that he presented it to the appellees, who severally, in order, endorsed it as accommodation endorsers thereon and as co-sureties with him, the appellant, neither the appellant nor the appellees having any actual interest in the note or the

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loan sought to be secured thereby; that it was signed by appellant and endorsed by appellees, to enable Blake to obtain the loan; that Blake, thereupon, discounted and sold the note to the bank at Lafayette; that it was not paid at maturity, but was protested for non-payment; that afterward on the 29th of March, 1860, the bank instituted suit upon the note, and recovered a judgment upon it on the 31st of May, 1860, against all the parties (copies of the note and the judgment being filed with the complaint). It is also alleged that execution issued upon the judgment on the 1st day of June of the same year, that it was levied upon the property of the appellant, and that he was compelled to pay the judgment; that Blake and Somerville have become insolvent; that the appellees have refused to pay any part of the amount paid by him. Prayer for an account and judgment.

The counsel for the appellant insists that the appellees are bound by the judgment on the note, and that it was alleged in the complaint and proved to be true by the court in that case, that the appellant and appellees were co-sureties for Blake. There is nothing alleged in the complaint in the case at bar showing what averments were in the complaint in that action. It is averred that the bank "brought her action upon said note." Whether the appellees were charged as endorsers, or in what character, does not appear. It is true, a copy of the proceedings and judgment is filed with the complaint. It was not necessary to file such copy. *Lytle v. Lytle*, 37 Ind. 281. And filing did not make it a part of the complaint. *The Excelsior Draining Company v. Brown*, 38 Ind. 384.

No action could be maintained by the endorsee of the note against the appellees as co-sureties. The terms of the writing and the endorsement fixed the liability of each signer, so as to render it unchangeable by parol evidence in such action. *Vore v. Hurst*, 13 Ind. 551; *Drake v. Markle*, 21 Ind. 433.

The question which the appellant seeks to raise is, whether, as between the parties who executed the paper before it had

been delivered or negotiated by the principal, the real character of the transaction may not be shown by parol.

It was presented in *Lacy v. Lofton*, 26 Ind. 324, where it was decided, that as between the parties upon a promissory note or bill of exchange, the form of the instrument is not conclusive, but that their actual relations may be shown by parol to be other than they appear to be, and that their rights will depend upon the actual facts. And it was held that the drawer of a bill of exchange for the accommodation of the payee was the surety of the latter, and entitled to the remedies of sureties against principals. In *Dickerson v. Turner*, 15 Ind. 4, it is said, that "when the drawee of a bill of exchange accepts the bill, the presumption is that he has, in his hands, funds of the drawer, to the amount stated on its face; but that presumption may be rebutted. The drawee may show that he accepted and paid the bill for the accommodation of the drawer, and, then, the law will imply an undertaking, on the part of the drawer, to indemnify the acceptor, who, on such implied obligation, may have an action against the drawer."

The mere fact that one drew and another endorsed a bill, for the sole accommodation of the drawee, will not establish the relation of co-sureties. *Wilson v. Stanton*, 6 Blackf. 507; *Church v. Barlow*, 9 Pick. 547; *M'Donald v. Magruder*, 3 Pet. 470. The parties will be presumed to have signed the paper with reference to the security which they already possessed. It is only a presumption, however, and unquestionably the liabilities of the parties, as they appear on the face of the paper, may be changed by contract. *M'Donald v. Magruder*, *supra*; *Dunn v. Sparks*, 7 Ind. 490.

The case of *Dunn v. Sparks*, *supra*, involved the question, whether the drawer and endorser of a bill were co-sureties for the sole accommodation of the drawee and acceptor. On page 494, DAVISON, J., says: "Under the pleadings in the cause, it was competent for the plaintiff, by extrinsic evidence, to show the relation which really did exist between him and the defend-

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ant. Whether they were, or were not co-sureties, was a pure question of fact, to be decided by the jury."

The case made by the complaint is this: Blake desired to borrow money, and, for that purpose, executed his note with the appellant as his surety, payable to the appellees, and, whilst it was yet in his hands, presented it to them, and they endorsed it as accommodation endorsers and co-sureties with the appellant for Blake, and to enable him to obtain the loan; neither the appellant nor the appellees having any interest in the note or in the loan sought to be obtained.

We think the allegations in the complaint are sufficient to show the real character of the transaction and the liabilities of the parties to each other, and that an issue of fact can be formed under it between them, whether they were, or were not co-sureties, as averred in the complaint.

The judgment of the said Clinton Common Pleas is reversed, with costs. Cause remanded, with instructions to overrule the demurrers to both paragraphs of the complaint, and for further proceedings, in accordance with this opinion.

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BILL OF EXCEPTIONS.—*Time of Filing.*—Where sixty days were given within which to file a bill of exceptions, and the bill was signed by the judge within that time, and, though it was copied into the record, it did not appear by any statement in the body of the record that it was ever filed, but the certificate of the clerk of the court below, given within the sixty days, stated that the record was a full, true, and complete transcript of all the proceedings had in the case, as the same appeared of record, and of papers on file in his office; *Held*, that it affirmatively appeared that the bill of exceptions was filed prior to the date of the certificate and within the time allowed by the court.

EVIDENCE.—*Witness.—Impeachment of.*—Where witnesses testified, on examination in chief, that the general character of a party for truth, veracity, and honesty was good, it was incompetent to ask them, on cross-examination, if they had heard certain of his neighbors say that the sheriff of a certain county

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127	470
43	132
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had come to arrest him for larceny on a warrant issued on an indictment found against him in that county.

SAME.—*Malicious Prosecution.—Probable Cause.*—In an action for damages for malicious prosecution, evidence of the general bad character of the plaintiff for morals is inadmissible to rebut evidence of want of probable cause.

SAME.—*Malice.*—The existence of malice is not imputed as a conclusion of law, but may be inferred as a fact from the want of probable cause. It is for the jury to determine whether they will so infer it or not.

SAME.—*Jury.*—A jury must consider all evidence introduced, decided to be admissible by the court.

SAME.—A jury have the right to disregard the evidence of a witness, in whole or in part, if they deem him unworthy, although his character for truth and veracity may not have been directly impeached, though they ought not to do so wantonly, without evidence or cause.

SAME.—*Confidential Communications.—Attorney and Client.—Prosecuting Attorney.—Waiver.*—Communications made to a prosecuting attorney relative to criminals or suspected persons are privileged, and cannot be divulged without the consent of the person making them. The immunity from disclosure of communications so made is a privilege personal to the one making them, which is not waived by his voluntarily testifying generally, in an action against him for malicious prosecution, in his own behalf, but is waived, if, being a witness in his own behalf, he voluntarily discloses what statements he made to the prosecuting attorney, who then may testify in relation to the communication.

From the Montgomery Circuit Court.

T. Patterson, M. D. White, and J. Wright, for appellant.

J. McCabe and J. M. Butler, for appellee.

OSBORN, J.—The only error assigned in this case is in overruling the motion for a new trial.

The action was brought by the appellee against the appellant for malicious prosecution. There was an issue of fact, trial by a jury, verdict for appellee for four hundred and thirty-nine dollars and fifty cents, and judgment on the verdict over a motion for a new trial filed by appellant.

Judgment was rendered on the 17th day of September, 1870, and sixty days were allowed the appellant to file his bill of exceptions. It appears to have been signed by the judge on the 27th day of October, but there is no statement in the body of the record showing that it was ever filed in the clerk's office in the cause. It has been held by this court, that it must appear affirmatively that the bill of excep-

tions was filed within the time allowed by the court, or it will not be regarded as forming a part of the record, although copied into it. This case was once considered by us and the judgment affirmed, without passing upon the alleged error of the court, on the ground that the bill of exceptions was not properly in the record. A petition for a rehearing was filed, calling our attention to the fact that the certificate of the clerk to the transcript was dated November 5th, 1870, which was within the sixty days, and we granted the petition.

The appellee again insists that under the uniform rulings of the court we can not recognize the bill of exceptions as forming a part of the record, and many decisions are cited to sustain him. The rule, that it must appear affirmatively that it was filed within the time allowed, is too well established to need the citation of any authority in its support. The certificate of the clerk, however, states that the record is a full, true, and complete transcript of the proceedings had in the case, as the same appear of record and of papers on file in his office. We think that sufficiently shows that the bill of exceptions, which is copied into the record, was filed prior to the date of the certificate and within the time allowed by the court.

We do not consider it necessary to state all the reasons assigned in the motion for a new trial. They were sufficient to fairly raise all the questions discussed and passed upon.

One of the reasons stated is, in excluding the legal evidence of certain witnesses named. The appellant had introduced witnesses to impeach the character of the appellee, and he had examined witnesses to sustain it, those named being of the number. They had testified, that they were acquainted with the general character of the appellee in his neighborhood for truth, veracity, and honesty, and that it was good. The bill of exceptions states that the appellant offered to prove by cross-examination of those witnesses, that they had heard certain of his neighbors say that the sheriff of Henry county had come there, for the purpose of

arresting him for larceny, on a warrant issued on an indictment found against him in that county; and the court, on the objection of the appellee, refused to permit him to introduce the proof. The purpose of the proof was not stated. The witnesses, in their examination in chief, had testified to the general character of the appellee, and nothing else. The proof offered was not legitimate as a cross-examination and would have laid no foundation for impeaching the witnesses. No time, place, or names of persons were mentioned. It was about a collateral and irrelevant matter, not affecting the general character of the appellee. It was a naked proposition to prove that the witnesses had heard the statement and nothing more. There was not even a charge that he was guilty, or that anybody in his neighborhood ever charged, suspected, or believed that he was. We are at a loss to see on what ground the proof was admissible. Its only effect, we think, would have been to improperly prejudice the jury against the appellee. The right to ask the witnesses whom they had heard speak about the character of the appellee, and whether what they had heard said was for or against him, is not denied by the appellee. Under some circumstances he might go further and ask other questions. It is difficult, if not impossible, to lay down specific rules to control or limit the cross-examination of witnesses. The judge before whom the case is tried must, to a considerable extent, determine it, and in doing so, must be governed by the circumstances attending the examination. Of course, his action is subject to the supervision of an appellate or superior court, in all cases when an appeal lies. In the case at bar, there is no statement in the bill of exceptions showing the circumstances under which the proof was offered, only, as we have seen, the offer to prove the fact. We think the court committed no error in rejecting the evidence.

Another reason was, that certain improper instructions prepared by the court were given to the jury. The jury were instructed, that they had the right to disregard the evi-

dence of any witness, in whole or in part, if they deemed him unworthy of belief, although the witness's character for truth and veracity might not have been directly impeached; that if they found there was an absolute conflict in the evidence, they should then carefully weigh it; and that they were the exclusive judges of the evidence and of its weight and the credibility of witnesses. The appellant objects to the instruction, on the ground that it should have gone further and told the jury that they must not disregard the testimony of a witness, unless there was evidence to justify them in so doing, and, also, that they should have been told what to do with the evidence after they had weighed it. The instruction, so far as it leaves the credibility of the witnesses to the jury, is not objectionable. The jury have the right to disregard or reject the testimony of a witness, if from his deportment on the stand or other evidence before them, they deem him unworthy of belief. They ought not to do it wantonly and without evidence or cause. In this case, as we have seen, there was evidence tending to impeach at least one witness. In addition to that, there was conflicting and contradictory testimony in the case. There was evidence before the jury from which they would be authorized, if not required, to reject the testimony of some of the witnesses. We do not think the instruction calculated to mislead the jury or leave them in doubt as to its meaning. From it, they would understand that they were to disregard the evidence of such of the conflicting or impeached witnesses as they, after carefully weighing all the evidence, deemed unworthy of belief. They would also understand that the object of considering or weighing the evidence was, to determine the credit it was entitled to in agreeing upon a verdict. If the appellant thought the instruction not sufficiently explicit, or if he desired a further instruction, he should have asked a modification or an additional charge.

The fourth instruction is as follows: "The prosecutor must also prove that the prosecution was instituted maliciously. In a legal sense, any unlawful act done wilfully and

purposely, to the injury of another, is, as against that person, malicious; and malice in the sense of the law, does not presuppose personal hatred or revenge, but may be implied under certain circumstances from a total want of probable cause, or from a gross and culpable omission to make suitable and reasonable inquiry; and, as before stated, both want of probable cause and malice must be shown to exist, to entitle the plaintiff to recover. Malice is a question of fact for the jury, *who may infer it from a want of probable cause, though they are not bound to do so.*"

The appellant objects to the words in italics in that charge. He insists that they should have been qualified, so that the jury would not be left at liberty to infer malice in the absence of circumstances tending to establish its existence.

We think the court committed no error in giving the instruction. The distinction between a conclusion or inference of law and fact was recognized. If the law imputed malice to the party on proof of want of probable cause, then the jury would be bound to infer it; but as it is one of fact, and not of law, it is for them to say whether they will so infer or not. As was said in *Wilkinson v. Arnold*, 11 Ind. 45, "malice may be inferred from the want of probable cause, as a matter of fact, but no such inference arises as a matter of law. The jury may draw such inference, if they see proper, * * * but they are not in law bound to do so." *Newell v. Downs*, 8 Blackf. 523; *Ammerman v. Crosby*, 26 Ind. 451. In *Farmer v. Darling*, 4 Bur. 1971, Lord MANSFIELD recognized implied as well as express malice in an action for malicious prosecution, and the other judges concurred in it. Want of probable cause and malice must both exist, in order to sustain the action; still, in the mode of proving them, there is a well established difference. The want of probable cause cannot be inferred from any degree of malice, but malice may be inferred from want of probable cause. 1 Hilliard Torts, 420, sec. 10.

In connection with this charge we will consider an instruction, asked by the appellant, that "the action should not be

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maintained without proof of rank and express malice and iniquity on the part of the defendant, in commencing the state prosecution," and refused by the court. It will be seen that it is in conflict with the authorities referred to. It was predicated, undoubtedly, upon note *a*, 1 Hilliard Torts, 416, containing an extract from the opinion of Lord Chief Justice HOLT in *Savill v. Roberts*, 12 Modern, 208 (referred to in the note as the 13th). After discussing the question as to when the action would lie and referring to such cases, he says, on page 211: "But though this action does lie, yet it is an action not to be favored, and ought not to be maintained without rank and express malice and iniquity." But it has been long settled that malice may be implied, and express malice need not be proved. Malice in fact is that kind of malice which is proved. When malice may be and is inferred from the want of probable cause, it is actual malice which is thus proved." *Vanderbilt v. Mathis*, 5 Duer, 304.

The appellant asked an instruction, that, to entitle the plaintiff to a verdict, malice must be proved to have actuated the defendant in commencing the action, and that it is an independent fact which must be proved, *and cannot be inferred as a conclusion of law*. The court gave the charge as asked, omitting the words in italics. The jury had already been told that they were not bound to infer malice, which, we think, was equivalent to stating that it was not a legal conclusion. They were told in the charge drawn by the court, that they were not bound to infer malice generally, which included both the inference of law and fact. It was not necessary to repeat it in another form.

Another instruction asked by the appellant in substance stated, that evidence of the general bad character of the plaintiff for morals in the neighborhood, etc., was admissible to rebut the evidence of want of probable cause; and if they believed it to have been bad at the time the prosecution was commenced against him, that fact should be taken

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into consideration by the jury. The court gave the charge as asked, substituting the word "may" for "should."

The appellee took no exception to the instruction. The appellant, however, insists that he was injured by the charge. We are unable to see any real difference in the instruction as asked and given. The evidence was before the jury, and they were told that it was admissible for the purpose stated, and that they might consider it. It seems to us that it is the same as if they were told that they must do so. It is entirely different from a conclusion, or inference, which may or may not be drawn by the jury. When they were told that certain evidence before them was admissible for a purpose stated, that of itself was equivalent to telling them that they must consider it; and the further statement that they might or must do so was unnecessary. We find no error in the charges given, or in refusing or modifying those asked.

There is one other question in the case, and that is in permitting a witness to testify without the consent and over the objection of the appellant. One of the attorneys for the appellee in the court below, but whose name does not appear in this court, was prosecuting attorney in Montgomery county, at and before the commencement of the prosecution, against the appellee. The appellant called upon him as such prosecutor to institute the prosecution against the appellee, and, as he testified, made a statement of the facts to him. At his request, the prosecuting attorney drew the affidavit upon which the prosecution was based, and prosecuted the appellee before a justice of the peace, where he was discharged. This action was for that prosecution. Before the next term of the Montgomery Circuit Court, that same attorney commenced this action. At the time of commencing the action, he continued to be prosecuting attorney. On the trial, the appellant was a witness in his own behalf, and voluntarily testified to the statement made by him to the prosecuting attorney, and professed to state fully all that was said. After the close of his evidence, and as rebutting evidence, the appellee offered the attorney, to whom the appel-

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ant had made the statement before mentioned, as a witness, to prove what the statement was and their conversation at the time. The appellant objected to his testifying on that subject, because the statement was a confidential communication between him and the prosecuting attorney, whilst he was seeking to bring a state prosecution, that ought not to be disclosed; that the relation of attorney and client virtually exists between a prosecuting attorney and those who come to him to institute criminal proceedings against others or take advice in relation to such matters. The objection was overruled, and the witness testified in relation to the conversation and what it was. His testimony was different from that of the appellant.

The appellee denies that any such confidential relations existed as to make the communication privileged. He insists that the prosecuting attorney is not the attorney of the party seeking to prosecute one charged with a criminal offence or making statements of facts to aid in the prosecution of criminals. In *Reed v. Smith*, 2 Ind. 160, it was held that it was not necessary that a fee should be paid to make the communication privileged. If the statement was made to an attorney in regard to the subject-matter of a suit, with a view to employing him as an attorney, it was sufficient to establish the relation of attorney and client. In *Jenkinson v. The State*, 5 Blackf. 465, it was held that when an attorney is consulted on business within the scope of his profession, the relation of attorney and client exists, and the communications on the subject between him and his client should be treated as strictly confidential. The same doctrine is held in *Bower's Adm'r v. Briggs*, 20 Ind. 139. The decisions of different courts are not harmonious on the question. We refer to those of two states only. In New York, it has been held that the communication must relate to an action pending or anticipated. *Whiting v. Barney*, 30 N. Y. 330. In Massachusetts, it has been held that it extends to all communications made to an attorney or counsellor, applied to by the party in that capacity with a view to obtain his legal, advice and opinion in

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matters of law in relation to his legal rights and obligations, whether with a view to the prosecution or defence of a suit, or other lawful subject. *Foster v. Hall*, 12 Pick. 89. The rulings of this court are in harmony with the Massachusetts court, and it seems to us they are sustained by reason. The communication is made for the purpose of getting legal advice in relation to some right or obligation, upon which to predicate some action of the party; and thus the relation of attorney and client is created, although no action is pending or anticipated. It is just as important that the communication should be confidential and secret, and its disclosure might affect his rights quite as much, as if it was made with reference to an action, and to disclose it would equally violate the confidence reposed in the attorney. Communications are made to attorneys and advice given, based upon such communications, concerning matters of the highest importance, about which no action is pending or anticipated.

To come more directly to the question before us; the State furnishes an attorney to prosecute all persons charged with crime. It is essential that he should be furnished with facts to enable him to successfully prosecute. Every good citizen, it is presumed, will aid in the conviction of offenders and communicate to the prosecuting attorney all the facts within his knowledge, tending to establish the guilt of such offender; and all such communications and statements made to him must be considered and held to be privileged, and must not be divulged without the consent of the party making them. The fact that the State furnishes the attorney can make no difference. The statement is made to one, who for the time being and for that purpose occupies the position of legal adviser. And that must determine the question, and not who selects or employs him. The prosecutor acts as attorney and receives the communication in that capacity. Public policy requires that a person in making communications to a prosecuting attorney, relative to criminals or persons suspected of being guilty of crime, should be at liberty to make a full statement to him without fear of disclosure.

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“There are some kinds of evidence which the law excludes or dispenses with, on grounds of public policy; because greater mischiefs would probably result from requiring or permitting its admission, than from wholly rejecting it.”

1 Greenl. Ev., sec. 236.

The appellee claims that even if the communication was privileged, the appellant, by voluntarily testifying in his own behalf, lost the privilege. He cites *King v. Barrett*, 11 Ohio St. 261. That case was decided upon a statute of that State. One section (310) of the code of Ohio provides, that “no person shall be disqualified as a witness in any civil action or proceeding, by reason of his interest in the event of the same, as a party or otherwise.” And section 315 of the same code provides, that “if a person offer himself as a witness, that is to be deemed a consent to the examination also of an attorney on the subject.” The decision was based entirely upon the section last quoted. We have no such statute.

The appellant was a witness on the trial of the case, in his own behalf, and voluntarily testified to his communication to the attorney, which he claims was privileged. Did that remove the injunction of secrecy? The object of extending to him the privilege is, that his communications shall not be disclosed without his consent. It is a personal privilege, and if he makes the disclosure himself, and undertakes to tell what statement he made to his attorney, it ceases to be a secret. Having opened the door himself by testifying to what took place between himself and his counsel and to the communications between them, he has made it public and thus consented that the attorney may testify in relation to it. It is no longer a secret, any more than if the statement had been made to his attorney in the presence and hearing of others, and with the avowed purpose that it should be heard by them. In such a case it could not be said that the communication was confidential, although made with the purpose of getting legal advice and to enable the attorney to give it. He would be asking advice on a public state-

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ment of facts. In *Parker v. Carter*, 4 Munf. 286, the court said that all communications made by a client to his attorney were to be regarded as confidential, "unless, indeed, the client should seem to vaunt his disclosures to the public, and, as it were, challenge the by-standers to hear them."

What we hold on the last question is this: If the party voluntarily testifies as a witness to confidential communications made to his attorney, he thereby destroys the privileged character of the communication and consents that the attorney may be a witness and testify in relation to the same communication, and state all that was said on that subject. We do not decide that he gives such consent by voluntarily testifying in the action generally. It is because he testifies and voluntarily discloses the confidential communication, that he waives the privilege and consents that the attorney may be a witness against him, and not because he testifies as a witness in the cause.

Whilst we decide that the testimony was admissible, we cannot approve the conduct of the attorney in bringing the action. He was the public prosecutor, and as such it was his duty to prosecute all offenders. By bringing this action before the meeting of the grand jury, he placed himself in antagonism to the State, and where he was liable to be tempted to neglect the discharge of his official duty.

The judgment is affirmed, with costs.

THE INDIANAPOLIS AND ST. LOUIS RAILROAD COMPANY v.
CHRISTY.

RAILROAD.—*Fences.*—*Killing Cattle.*—Railroad companies are not required to fence their tracks at stations and sidings where freights or passengers are received or discharged; nor are they liable to pay for cattle that may wander

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upon the track at such places, and be killed without negligence on the part of the company.

From the Hendricks Circuit Court.

M. A. Osborn, for appellant.

S. Claypool, C. C. Matson, and L. P. Chapin, for appellee.

WORDEN, J.—Action by the appellee against the appellant for killing a steer on the railroad where it was not fenced, no negligence being charged. Issue, trial by the court, finding and judgment for the plaintiff, a new trial being denied to the defendant.

The facts, as we gather them from the evidence, are these: The animal entered upon the track at Reno Station, in Hendricks county. At this station there is a switch, or side track, thirteen hundred and twenty feet in length, and at or near each end of the switch are cattle-guards, to which the road is fenced, leaving the distance occupied by the switch unfenced. There are a station-house and cattle-pens at the station, along the line of the switch between the termini thereof. Freight and passengers are received and discharged at the station. The animal entered upon the track about midway of the switch.

It is claimed by counsel for the appellant that the company was not required to fence the road at the station, and we are of that opinion. The statute on the subject "is in the nature of a police regulation, intended as a security to the public, and for the preservation of human life; and hence it has been repeatedly held by this court that it does not apply to cases where animals are killed at points on the railroad where it would be illegal or improper that the road should be fenced, such as the crossings of streets or alleys in a city or town, or other public highways, or at mills, etc., where public convenience requires the way to be left open." ELLIOTT, J., in the case of *The Indianapolis, etc., R. R. Co. v. Parker*, 29 Ind. 471. A similar question was fully considered in the later case of *The Jeffersonville, etc., R. R. Co. v. Beatty*, 36 Ind. 15.

It is the business of railroad companies to transport freight and passengers, and for that purpose there must be stations at which freight and passengers may be received and discharged. This necessity is recognized by the statute, which provides that "every such corporation shall start and run their cars for the transportation of persons and property at regular times, to be fixed by public notice, and shall furnish sufficient accommodation for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, offer, or be offered, for transportation, at the place of starting, and the junctions of other railroads, and at siding and stopping places, established for receiving and discharging way-passengers and freight, and shall take, transport and discharge such passengers and property at, from and to such places, on the due payment of tolls, freight or fare therefor." 1 G. & H. 516, sec. 29.

The public convenience, it seems to us, requires that at stations or sidings, where freight or passengers are received and discharged, the approach to the road should be free and unobstructed by a fence; and, therefore, that at such places the company is not required to fence, or, in default thereof, pay for stock that may wander upon the track and get killed without negligence on the part of the company. The statute above quoted makes it the duty of railroad companies, were such not the case in the absence of a statute, to receive and discharge freight and passengers "at siding and stopping places;" and we think that at such places public convenience clearly requires that there should be free ingress to, and egress from, the road. In this case the siding seems to be pretty long, but we cannot say that it is longer than the convenience and necessities of business require.

For these reasons, we are of opinion that a new trial should have been granted.

The judgment below is reversed, with costs, and the cause remanded, for further proceedings.

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INSTRUCTIONS.—*Supreme Court.*—In placing a construction upon instructions complained of, this court will look at all the instructions given on the same subject; and if the instructions taken together present the law correctly, and are not calculated to mislead the jury, the judgment will not be reversed thereon.

SAME.—*When Inconsistent.*—If two charges are inconsistent with each other, if they were calculated to confuse and mislead the jury, or if they must have left the jury in doubt or uncertainty as to the law applicable to the facts of the case, then the judgment should be reversed.

SAME.—*Assault and Battery.*—In a prosecution for assault and battery, the court instructed the jury, that if, under certain circumstances mentioned in the charge, "the defendant struck or beat the prosecuting witness while he was gathering corn in the field; or, while he was driving his team in the field, in the act of gathering corn, the defendant struck and beat the horses of the prosecuting witness in a rude and angry manner with a stick, the defendant is guilty of an assault and battery."

Held, that, as there was evidence tending to prove that the defendant did strike the horses when being driven, the instruction was calculated to mislead the jury to the conclusion that such striking the horses was an assault and battery upon the driver, which it was not in any legal or logical sense, the driver himself not having been touched directly or indirectly; and hence such instruction was erroneous.

From the Marion Criminal Circuit Court.

J. W. Gordon, T. M. Browne, R. N. Lamb, and J. N. Kimball, for appellant.

J. C. Denny, Attorney General, for the State.

BUSKIRK, J.—This was a prosecution for an assault and battery commenced before a justice of the peace. The affidavit charges the appellant with having, at Marion county, on the 28th day of February, 1873, unlawfully, and in a rude, insolent, and angry manner, touched, etc., Charles Bein.

The appellant was tried and found guilty by the justice. The case was appealed. It was tried on appeal in the Marion Criminal Court, where the State again obtained a verdict. The appellant moved for a new trial, which was overruled, and the judgment was rendered on the verdict.

The error assigned is the overruling of the motion for a new trial. A reversal of the judgment is asked mainly upon the

43	146
131	224

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135	321

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ground that the court gave an erroneous instruction to the jury.

The instruction complained of as erroneous is as follows:

"2. To constitute a battery, the touching need not be of great force; a mere touching is sufficient, if it be unlawful and be done in a rude, or an insolent, or angry manner. But this touching must be unlawful. A man may defend the possession of his estate and of his chattels by such reasonable force as may be necessary to that end; and if, in this case, you believe from the evidence, that at the time of the alleged assault and battery, Charles Bein was trespassing upon the lands of the defendant, and engaged in carrying away without right the corn of the defendant, the defendant had the right, after requesting Bein to depart, and a refusal on his part to leave the property and premises, to use such reasonable force as was necessary to eject him from the premises and protect his personal property; and if the defendant, in thus protecting his property and possession, touched Bein or assaulted him only so much as was reasonably necessary to secure the object aforesaid, he is not guilty, and you should so find. But if the jury believe from the evidence, that defendant rented the fields referred to in the evidence, no certain time being fixed for the termination of the lease, to Charley Bein, to be cultivated in corn, upon the shares, to be gathered by Bein, one-half to be delivered to defendant, and the other to be retained by the renter or tenant for his share, the mere fact that an agreement was made in the fall after, by which it was agreed that the tenant (Bein) take for his share of the corn the south field, and defendant the north field as his share, except three acres in the south field, this would not terminate the lease of itself, unless it was agreed between the parties that the lease should terminate. Nor would such facts authorize the defendant to forcibly eject Bein from the field because he was gathering more corn for his own use than he was entitled to by such agreement; and if, under such circumstances, the defendant struck or beat Bein, while he was gathering

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corn in the field, or while Bein was driving his team in the field in the act of gathering the corn, the defendant struck and beat his horses in a rude and angry manner with a stick, the defendant is guilty of an assault and battery."

The Statute says: "Every person who in a rude, insolent or angry manner, shall unlawfully touch another, shall be deemed guilty of an assault and battery," etc. 2 G. & H. 459.

It is quite clear, therefore, that no assault and battery can be committed, unless one person touches another person unlawfully, and in a rude, or insolent, or angry manner. The affidavit charges that the appellant thus touched Charles Bein. To sustain this charge, the evidence must show the unlawful touching, etc., of Charles Bein. The charge excepted to, however, instructs the jury, that, if the defendant struck Charles Bein's horses with a club, in a rude and angry manner, while Bein was driving his team, in the act of gathering corn, etc., the defendant is guilty of an assault and battery. In this instruction the court deems the touching of Bein wholly immaterial and unimportant; to strike Bein's horses is to strike him, that is, if they were struck with a club, and it was done while he was driving his team in the field, in the act of gathering corn. To strike the horses of Bein was in no legal or logical sense to strike him. True, if the blow touched both Bein and his horse, the touching would be an assault and battery on Bein, not because of the touching of his horse, however, but for the reason that it touched him.

And if the appellant struck and drove Bein's horse, or any other horse, against him violently, unlawfully, and in a rude, etc., manner, then he would be guilty, not because he struck the horse, but for the reason that he struck Bein by running or pushing the horse against him. If Bein was so connected with his horses when they were struck, that the blow took effect on his person as well as that of the horses, then the person striking the blow would be guilty.

Bishop, in his work on Criminal Law, in sec. 72, vol. 2, says:

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"The slightest unlawful touching of another, especially if done in anger, is sufficient to constitute a battery. For example, spitting in a man's face, or on his body, or throwing water on him, is such. And the inviolability of the person, in this respect, extends to every thing attached to it."

Russell, on Crimes, vol. 1, p. 751, says: "The injury need not be effected directly by the hand of the party. Thus there may be an assault by encouraging a dog to bite. * * * And it seems that it is not necessary that the assault should be immediate; as where the defendant threw a lighted squib into a market-place, which, being tossed from hand to hand, by different persons, at last hit the plaintiff in the face, and put out his eye, it was adjudged that this was actionable as an assault and battery. And the same has been holden where a person pushed a drunken man against another."

Greenleaf on Evidence, in discussing the question of battery, says: "A battery is the actual infliction of violence on the person. This averment will be proved by evidence of any unlawful touching of the person of the plaintiff, whether by the defendant himself, or by any substance put in motion by him. The degree of violence is not regarded in the law; it is only considered by the jury, in assessing the damages in a civil action, or by the judge in passing sentence upon indictment. Thus, any touching of the person in an angry, revengeful, rude, or insolent manner; spitting upon the person; jostling him out of the way; pushing another against him; throwing a squib or any missile, or water upon him; striking the horse he is riding, whereby he is thrown; taking hold of his clothes in an angry or insolent manner, to detain him, is a battery. So, striking the skirt of his coat or the cane in his hand, is a battery. For anything attached to his person partakes of its inviolability."

Blackstone defines a battery as follows:

"3. By battery, which is the unlawful beating of another. The least touching of another's person wilfully, or in anger,

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is a battery; for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner." 3 Cooley's Blackstone, 120.

Note 4 by Judge Cooley, on same page, reads as follows: "A battery is an unlawful touching the person of another by the aggressor himself, or any other substance put in motion by him. 1 Saund. 29, b. n. 1; id. 13 and 14, n. 3. Taking a hat off the head of another is no battery. 1 Saund. 14. It must be either wilfully committed, or proceed from want of due care: Stra. 596; Hob. 134; Plowd. 19; otherwise it is *damnum absque injuria*, and the party aggrieved is without remedy: 3 Wils. 303; Bac. Ab. assault and battery, B.; but the absence of intention to commit the injury constitutes no excuse, where there has been a want of due care. Stra. 596. Hob. 134. Plowd. 19. But if a person unintentionally push against another in the street, or if without any default in the rider a horse runs away and goes against another, no action lies. 4 Mod. 405. Every battery includes an assault: Co. Litt. 253; and the plaintiff may recover for the assault only, though he declares for an assault and battery. 4 Mod. 405."

Counsel for appellee have referred us to the following adjudged cases as supporting the instruction under examination; *Respublica v. De Longchamps*, 1 Dallas 111; *The State v. Davis*, 1 Hill S. C. 46; *Dubuc De Marentille v. Oliver*, Penning. 379; *The United States v. Ortega*, 4 Wash. C. C. 531.

The case referred to in Dallas was a prosecution under the laws of nations for an assault and battery upon the Minister of the French Government resident in this country. It was proved upon the trial that the defendant struck with a cane the cane of the French Minister. The court say: "As to the assault, this is, perhaps, one of the kind, in which the insult is more to be considered than the actual damage; for though no great bodily pain is suffered by a blow on the

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palm of the hand, or the skirt of the coat, yet these are clearly within the legal definition of assault and battery, and among gentlemen, too often induce duelling, and terminate in murder. As, therefore, anything attached to the person, partakes of its inviolability; De Longchamps' striking Monsieur Marbois' cane, is a sufficient justification of that gentleman's subsequent conduct."

The case referred to in Pennington, *supra*, was a civil action for a trespass committed by the defendant on the property of the plaintiff, by striking with a large club the plaintiff's horse, which was before a carriage in which the plaintiff was riding. The court say: "To attack and strike with a club, with violence, the horse before a carriage, in which a person is riding, strikes me as an assault on the person; and if so, the justice had no jurisdiction of the action. But if this is to be considered as a trespass on property, unconnected with an assault on the person, I think it was incumbent on the plaintiff below, to state an injury done to the horse, whereby the plaintiff suffered damage; that he was in consequence of the blow bruised or wounded, and unable to perform service; or that the plaintiff had been put to expense in curing of him or the like."

The above case being an action of trespass for an injury to the horse of the plaintiff and not a prosecution for an assault, or an assault and battery upon the person of the plaintiff, we think that but little importance should be attached, or weight given to the loose remark of the judge, that the striking of a horse attached to a carriage was an assault upon the person riding in the carriage.

The case of *The State v. Davis*, *supra*, was a prosecution for an assault upon an officer, in releasing from his custody a negro. The facts will sufficiently appear from the quotation which we make from the opinion of the court. The court say:

"The general rule is, that any attempt to do violence to the person of another, in a rude, angry, or resentful manner, is an assault; and raising a stick or fist, within

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striking distance, pointing a gun within the distance it will carry, spitting in one's face, and the like, are the instances usually put by way of illustration. No actual violence is done to the person in any one of these instances; and I take it as very clear that that is not necessary to an assault. It has, therefore, been held that beating a house in which one is, striking violently a stick which he holds in his hand, or the horse on which he rides, is an assault; the thing in these instances partaking of the personal inviolability. *Respublica v. De Longchamps*, 1 Dall. 114; *Wambough v. Shank*, Penning. 229, cited in 2 part Esp. Dig. 173.

"What was the case here? Laying the right of property in the negro out of the question, the prosecutor was in possession, and legally speaking, the defendants had no right to retake him with force. As far as words could go, their conduct was rude and violent, in the extreme. They broke the chain with which the negro was confined to the bedpost, in which the prosecutor slept, and cut the rope by which he was confined to his person, and are clearly within the rule. The rope was as much identified with his person, as the hat or coat which he wore, or the stick which he held in his hand. The conviction was therefore right."

We are inclined to the opinion that the chain and rope so connected together the prosecutor and negro, as to make the identification as complete as the hat or coat on the person or the stick in the hand. The ruling in the above case was based upon the close and intimate connection which existed between the prosecutor and the negro; but no such identity or connection between the prosecutor and his horses in the case in judgment is shown.

The case of *The United States v. Ortega, supra*, was a prosecution instituted by the United States, for the purpose of vindicating the law of nations and of the United States, offended, as was alleged, in the person of a foreign minister, by an assault committed on him by the defendant. The proof was, that the defendant seized hold of the breast of the coat of Mr. Salmon, the prosecuting witness, and retained

his hold while he enumerated his cause of grievance, and until a third person came up and compelled him to release his hold.

The court said: "It was argued by the counsel for the defendant, that, to constitute an assault, it must be accompanied by some act of violence. The mere taking hold of the coat, or laying the hand gently upon the person of another, it is said, does not amount to this offence; and that nothing more is proved in this case, even by Mr. Salmon. It is very true that these acts may be done, very innocently, without offending the law. If done in friendship, for a benevolent purpose, and the like, the act would certainly not amount to an assault. But these acts, if done in anger, or a rude and insolent manner, or with a view to hostility, amount, not only to an assault, but to a battery. Even striking at a person, though no blow be inflicted, or raising the arm to strike, or holding up one's fist at him, if done in anger, or in a menacing manner, are considered by the law as assaults."

It is very obvious that the above cases do not support the position assumed by the counsel for appellee, but are in entire accord with the elementary writers from whom we have quoted.

The most accurate and complete definition of a battery that we have met with is that given by Saunders, and which has been adopted by most subsequent writers, and that is: "A battery is an unlawful touching the person of another by the aggressor himself, or any other substance put in motion by him." By this definition, it is an essential pre-requisite that the person must either be touched by the aggressor himself or by the substance put in motion by him. There must be a touching of the person. One's wearing apparel is so intimately connected with the person, as in law to be regarded, in case of a battery, as a part of the person. So is a cane when in the hand of the person assaulted.

But in the case under consideration, the court ignores all these things and instructs the jury to convict on proof

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alone of the striking of the horses of the prosecuting witness. It is not even necessary, according to this charge, that the prosecuting witness should have been in the wagon or ~~holding the lines~~ holding the lines or connected with or attached to the horses in any way. That Bein was driving his team and gathering his corn does not necessarily so connect him with the horses that the touching of the horses would be an assault and battery on him. He may have been, as is frequently done, driving his horses from one pile of corn to another, by words of command, without being in the wagon or having hold of the lines.

The law was correctly stated by the court in the first charge given to the jury. It was as follows: "Before you will be justified in finding the defendant guilty, the evidence must satisfy you beyond a reasonable doubt that the defendant, at, etc., * * in a rude, or an insolent, or an angry manner, touched Charles Bein."

In placing a construction upon the instruction complained of, it is our duty to look at all the instructions given on the same subject; and, if the instructions taken together present the law correctly and are not calculated to mislead the jury, we should affirm the judgment

On the other hand, if the two charges are inconsistent with each other, if they were calculated to confuse and mislead the jury, or if they must have left the jury in doubt or uncertainty as to what was the law as applicable to the facts of the case, then the judgment should be reversed. *Somers v. Pumphrey*, 24 Ind. 231. The above rules have been applied by this court in civil cases. The rule laid down in criminal causes is as follows: "An erroneous instruction to the jury in a criminal case cannot be corrected by another instruction, which states the law accurately, unless the erroneous instruction be thereby plainly withdrawn from the jury." *Bradley v. The State*, 31 Ind. 492.

Construing these charges together, how do they stand? The jury are first told that, to justify a finding of guilty, they must be satisfied beyond a reasonable doubt that the defend-

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ant touched Charles Bein; and then, in the second charge, the court continues, that the defendant might lawfully employ reasonable force, etc., in defence of his possession or property, but that under circumstances hypothetically put by the court, Charles Bein had the right to be on the defendant's premises gathering corn," and if under such circumstances, etc., while Bein was driving his team in the field in the act of gathering the corn, the defendant struck and beat his horses in a rude and angry manner, with a stick, the defendant is guilty of an assault and battery."

Plainly, then, the charge is, that the evidence must show the touching of Charles Bein by the defendant, but that if Bein is driving his team, etc., and the defendant strikes his horses (that is Bein's horses) with a stick, in a rude and angry manner, then, such touching of the horses is, in law, a touching of Bein, and the defendant is guilty of an assault and battery. Logically the charge states the law thus: Generally, to sustain a charge of assault and battery on A., it is essential to prove a touching of A. by the defendant, but under certain circumstances, such as if A. is driving his team, etc., and the defendant touches the horses of A., then, in that case, such touching of the horses is a touching of A., and if such touching of the horses is unlawfully done, and was made, etc., then the defendant may be found guilty of an assault and battery on A.

There was evidence tending to prove that the defendant struck Charles Bein. He and his two sons, Edward and Frank, so swear. The defendant swears he did not.

The following is briefly the evidence tending to prove the assault and battery upon the horses:

Charles Bein testified: "He hit my horses on the head with a big club about three feet long. * * * He struck my horses two or three times. * * * He was mad. * * * I was loading corn out of the piles; was loading up corn when he struck the horses."

Same witness on cross-examination testifies: "When he struck the horses, he struck them on the head, and they

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stopped, etc. Don't know who held the lines. Maybe my little boy held one and me the other. * * * He struck the horse next to me. * * * The team was made to stand when defendant struck the horses. * * * I was not in the wagon when he struck them."

Edward Bein testified: "Kirland hit the horses on the head, and they stopped. We were just going to drive out. My father was then standing on the ground near the wagon. Defendant put his hands on the horses to unhitch them from the wagon; tried to unhitch the traces. Just before that he struck the horses, when father was standing on the other side of the wagon."

Frank Bein testified. "At the time the horses were struck, father was in the wagon."

The defendant testifies, that he "didn't touch the horses, except that he attempted to unhitch them from the wagon."

It is apparent that there was evidence in the case to which the second instruction was applicable. The verdict being general we are unable to determine whether he was convicted for touching the person of Bein or for striking his horses. It may be that the jury found the defendant guilty of striking the horses of Bein, for the defendant admitted that he attempted to unhitch the horses from the wagon, and consequently must have touched them, while he positively denies that he touched the person of the prosecuting witness. Besides, there was evidence tending to impeach the character of Bein. The jury may, therefore, have doubted, reasonably, the guilt of the defendant in the striking of Bein, and found him guilty only of having "in a rude and angry manner struck the horses of Bein with a stick," while "he was driving his team in the act of gathering corn."

The second instruction was inapplicable to the evidence and was calculated to mislead the jury, and being erroneous, the judgment should be reversed.

The judgment is reversed; and the cause is remanded, for a new trial in accordance with this opinion.

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168	451
168	474

PRACTICE.—*Appearance.*—*Summons.*—*Service of Process.*—*Waiver.*—It is too late, after an appearance has been made to an action, to object to the summons or the service thereof.

PLEADING.—*Corporation.*—The allegation, in a complaint, that the defendant is a common carrier doing business under the style and firm name of The Adams Express Company, implies that the defendant is a corporation, and not a copartnership.

SAME.—*General Denial.*—*Evidence.*—Where an action is brought against a defendant by a name implying a corporation, and in that name such defendant forms an issue by general denial and goes to trial, it is not necessary for the plaintiff to introduce any evidence of the existence of the corporation.

From the Monroe Common Pleas.

G. A. Buskirk, J. H. Loudon, C. Baker, O. B. Hord, and A. W. Hendricks, for appellant.

R. Hill and G. W. Richardson, for appellee.

DOWNEY, C. J.—This was an action by the appellee against the appellant, on a contract, by which the appellant agreed, as a common carrier, to carry a certain amount of money and certain valuable papers from Bloomington to Columbus, in this State, and deliver the same to the plaintiff, which it is alleged the defendant failed to do. The contract is evidenced by the company's receipt, in the usual form, signed by the agent of the company, and made part of the complaint.

On the second day of the term, the following entry was made: "Come again the parties by their counsel, and the defendant is ruled to answer on the third day." On the third day, the defendant moved the court to set aside the summons, and still later moved to set aside the service of the summons. These motions were overruled, and the rulings are the first questions presented for our decision. In our opinion, the objections came too late. There was a full appearance to the action on the second day of the term by the defendants, and a submission to a rule to answer on the next day. In *Womack v. McAhren*, 9 Ind. 6, a question was decided by the court much like this. The parties appeared on

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the 3d day of July, and a rule was taken against the defendant to answer at the next calling of the cause. On the fifth day of July, the parties again appeared, and the defendant moved the court to continue the cause, because the summons had not been served in time. The court said: "After appearing and suffering the rule to plead to pass on the third day, it seems too late to take advantage of the service on the fifth." The court again say: "Objections to process, and other preliminary and merely formal matters not going to the merits, should be taken at the earliest moment." "All objections to the writ are waived by an appearance to the action." *Brayton v. Freese*, 1 Ind. 121. The motion to set aside the summons, and that to set aside the service thereof, were properly disallowed, for the reason that they were made too late, no matter whether the summons or the service was in proper form or not. They had performed their office when they had secured the appearance of the defendant to the action.

The next question relates to the sufficiency of the complaint. It commences thus: "Ralph Hill complains of The Adams Express Company, and says that, at the time hereafter mentioned, the defendant was a common carrier, doing business as such under the style and firm name of The Adams Express Company," etc. A demurrer to the complaint was filed, alleging, among other objections to it, that it did not state facts sufficient to constitute a cause of action. The specific objection to the complaint is, that it shows that the defendant was a firm or copartnership, and that the names of the members should have been set out as the defendants. The position of counsel for the appellant and authority cited in support of it as taken from their brief are as follows:

"This demurrer raised directly the question whether a firm or copartnership can be sued in and by the firm name, without disclosing the names of the individuals who compose the firm, or bringing them before the court by the service of process. That this cannot be done, is so plain as hardly to require the citation of authorities in its support. We

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cite, however, a few of the many decisions directly in point. *Hays v. Lanier*, 3 Blackf. 322; *Holland v. Butler*, 5 Blackf. 255; *Livingston v. Harvey*, 10 Ind. 218; *Gott v. Adams Express Company*, 100 Mass. 320."

In the case in 3 Blackf., the plaintiffs were designated thus: "Stapp, Lanier & Co." It was held that they could not sue in their firm name. In the case in 5 Blackf., the plaintiff sued the defendants by their firm name of "W. & J. Holland," and the declaration was held bad. In the case in 10 Ind., the defendants were designated as "Livingston, Fargo & Co., and Wells, Butterfield & Co., as proprietors of, and doing business under the name and style of, The American Express Co." The objection was held to be fatal. The rule recognized and applied in these cases is well established and has been often applied. But we think it does not quite meet the point in question. It has often been held by this court that, in suing in the name of a corporation, it is unnecessary to allege that the plaintiff is a corporation. 1 Davis Ind. Dig., Tit. Corporation, 279, sec. 128. But does the same rule apply when a corporation is the defendant? In *Angell & Ames Corp.*, sec. 649, it is laid down that "a corporation may be declared against by the name by which it is known, without alleging it to be chartered or incorporated; if the description impliedly amounts to an allegation that the defendants are a corporate body." In the case under consideration, the action is against "The Adams Express Company." This, we think, implies that the defendant is a corporation. The name of no individual is disclosed. What is added as to the style and firm name in which it did business, so far as it would seem to convey the notion that it is a firm or copartnership, may, we think, be rejected. It is evident that some part of the description must be rejected. The defendant is spoken of as a single person or entity, in the singular number. There is nothing implying plurality, except the use of the word "firm." Possibly this word was used by inadvertence or without a clear understanding of its meaning. Rejecting the word "firm" as merely surplusage,

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and there is nothing in the complaint inconsistent with the idea that the defendant is a corporation. We think the complaint was not liable to the objection urged against it. No other objection is urged.

The answer of the defendant was in four paragraphs. Demurrers were sustained to all of them except the first, which was the general denial. No question is made in the brief of counsel with reference to the sustaining of these demurrers. The issue formed by the general denial was tried by the court, and there was a judgment for the plaintiff. A motion made by the defendant for a new trial was overruled, and there was final judgment for the plaintiff.

In addition to the errors already considered, it is alleged that the court erred in overruling the motion of the defendant for a new trial. The reason for a new trial which is relied upon is stated by counsel for the appellant as follows: "But if the plaintiff could, under his complaint, have been permitted to prove the corporate existence of the defendant, still the evidence, which is made a part of the record by bill of exceptions, shows that no attempt was made to adduce any such proof. The general denial was in, and it put the plaintiff to the proof of the defendant's corporate existence, if it is pretended to have had or to have such an existence. For want of such proof, the motion for a new trial should have been granted, and the failure to grant it is another conclusive reason for the reversal of the case."

Had The Adams Express Company sued Mr. Hill on the contract in question, or any contract made with it, there are many cases in this court holding that he could not have denied the existence of the corporation at the time of making the contract. 1 Davis Ind. Dig., Tit. Corp., sec. 132. It is not necessary that the contract should state that the party with whom it was made is a corporation. If the style by which a party is contracted with is such as is usual in creating corporations, that is, if it name an ideality, but discloses no name of an individual, as is usual in the case of partnerships, it will be treated as, *prima facie*, at least, show-

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ing the existence of a corporation. *Jones v. The Cincinnati Type Foundry Co.*, 14 Ind. 89. If, when a contract is made with an entity claiming to be a corporation, the party contracting with it cannot deny its existence as a corporation at the time, why does not the same principle and policy require that the rule shall apply to the corporation also? Why shall not the rule be reciprocal in its operation? Why shall the alleged corporation not be estopped, when sued on the contract, from denying that it was a corporation at the time? If it can deny the existence of the corporation, the practice involves this absurdity, to take the present case as an illustration: The Adams Express Company is sued and charged with having made and violated a contract, and damages are sought to be recovered against the company. But the defendant, The Adams Express Company, comes into court and says there is no such artificial person or corporation as The Adams Express Company. If a natural person is sued upon a contract which he has made, is it admissible for him to come into court and allege as a bar to the action that there is no such person? To deny the making of the contract alleged is a different thing and involves no inconsistency. If in such a case there is no such corporation, who has a right to set up that fact as a bar to the action? Can a non-entity employ counsel and defend an action? If there is no such corporation, who is harmed if a judgment shall be rendered against that imaginary something which was supposed to be, but which was not, a corporation?

In this case the clerk, in making up the transcript, has not copied into it the title of the action at the head of the demurrer to the complaint or at the beginning of the answer. If they had been copied, we presume they would have shown that the parties to the action were "*Ralph Hill v. The Adams Express Company.*" In and by the demurrer to the complaint, the defendant, The Adams Express Company, said it demurred to the complaint, because it did not state facts sufficient, and under this demurrer urged that there was no

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such corporation as The Adams Express Company. When this objection was disallowed, it pleaded a general denial of the complaint, and went to trial, the attorneys of The Adams Express Company appearing for it and conducting the cause. The contract, purporting to have been made by the company through its agent, is read in evidence, the breach of the contract is shown, the company also introduces evidence to disprove the breach of the contract, and there is judgment for the plaintiff against the company. Now The Adams Express Company comes and says, you did not prove that I was The Adams Express Company. Suppose that it is true that there is no such corporation as The Adams Express Company, the judgment will simply be null and void, wholly incapable of enforcement against any person natural or artificial. It seems to be decided in *Gott v. Adams Express Company*, cited by counsel, *supra*, that, according to the law and practice in Massachusetts, when a suit is against a corporation, and the general denial is pleaded by the alleged corporation, the case is not made out, on the trial, without proof of the existence of the corporation. We do not think that this is the law in this State. In our opinion, it was not necessary for the plaintiff in this case, under the circumstances of the case and the issues formed, to introduce any evidence of the existence of the corporation. *Ewing v. Robeson*, 15 Ind. 26; *Callender v. The Painesville, etc., Railroad Co.*, 11 Ohio St. 516.

The judgment is affirmed, with five per cent. damages and costs.

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PRINCIPAL AND SURETY.—*Extension of Time.*—Where there is an extension of time, for a definite period, by the payee to the principal of a promissory note, for a valuable consideration, without the consent of the surety, the surety is discharged.

SAME.—*Pre-payment of Interest.*—From the payment of interest in advance, by the maker to the holder of a promissory note, whether at the rate specified in the note, or at a higher rate, and the receipt thereof by the holder as interest, an agreement is implied to extend the time of payment during the period for which interest is thus paid.

SAME.—*Extension of Time Indefinitely.*—Where there is an agreement for the extension of the time of payment of a promissory note generally, for no definite time, and interest has been paid in pursuance of such agreement, but not in advance, there is no implied agreement to extend the time of payment for any particular length of time, and the surety is not discharged.

SAME.—On a note dated March 7th, 1859, payable twelve months after date, with interest at the rate of six per cent, the receipt of an increased rate of interest and indorsement of payment of such interest on the note as follows: "March 7th, 1860, interest paid up to this date," did not operate as an agreement for an extension of the time of payment.

From the Ripley Circuit Court.

J. W. Gordon, T. M. Browne, and R. N. Lamb, for appellant.

W. D. Willson and T. E. Willson, for appellee.

WORDEN, J.—This was an action by the appellee as executor of the last will of John Henson deceased, against Willis Lemon and Gilbert W. Jarvis, upon a promissory note, of which the following is a copy:

"MARCH 7th, 1859.

"Twelve months after date, I promise to pay, to the order of John Henson, the sum of two hundred and twenty-eight dollars, value received, with six per cent.

(Signed.)

"WILLIS LEMON,

"GILBERT W. JARVIS."

On the back of the note the following credits are indorsed:

"1860, March 7th.

"Interest paid up to this date."

"June 22d, 1863.

"Received twenty dollars as interest."

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The defendant Lemon pleaded a discharge in bankruptcy.

Jarvis pleaded that he was surety only on the note, and that by an agreement between Lemon and Henson, without his knowledge or consent, the time for the payment of the note had been extended, on an agreement to pay ten per cent. interest. Issue, trial by jury, and verdict for plaintiff.

The defendants moved for a new trial, and the motion was granted as to Lemon, but overruled as to Jarvis, and the latter excepted. The cause was then dismissed as to Lemon and final judgment taken against Jarvis.

The appellant brings the case here on the evidence and instruction of the court.

The court charged the jury, among other things, as follows: "The law is, when there is an extension of time for a definite period, between the payee and the principal of a note, for a valuable consideration, without the consent of the surety, he is discharged from liability. The agreement, however, must be for a fixed period, a definite time. As for a definite time, it makes no difference whether the time is long or short; that is immaterial. There must be a valuable consideration. If there is a definite time agreed upon, the agreement to pay therefor the same interest as the note is drawing, during the extension, will constitute a valuable consideration; or an agreement to pay a greater rate of interest, will be a valuable consideration. If the time is indefinite, then the surety will not be released; or if there is a simple indulgence for a length of time indefinite, a greater rate of interest may have been paid therefor, this will not discharge the surety. When a definite time has been agreed upon, it is not necessary that the consideration be paid; it is sufficient if there was an agreement to pay."

The motion for a new trial was based upon the ground, among other things, that the court had erred in giving so much of the above charge "as has reference to time, and that the time must be definite." We are of opinion that the charge, in respect to the objection thus made to it, was

correct. *Meniffee v. Clark*, 35 Ind. 304. But an apparently different objection is made to the charge in the brief of counsel for the appellant. The following extract from their brief will show their objection to the charge: "The court instructed the jury that they must find for the plaintiff, unless the agreement was for a definite time expressly, between Lemon and Henson, and left the jury apparently no discretion to infer such definite time from the evidence of the payment of one year's interest at ten per cent. and other circumstances. Now we insist that this instruction was erroneous. The agreement for further time, and for an increased rate of interest, and the payment of one year's interest at the increased rate, was proof of a valid agreement for one year's further time; and there being no evidence adverse to this, the court should have instructed the jury that such evidence was sufficient."

We do not find, from an examination of the charge, that the court instructed at all that there must be an express agreement to extend the time. The court did not instruct as to what facts would justify the inference of an implied agreement for extension, nor was it asked to do so. If the appellant had desired an instruction upon that point he should have asked it.

There was no error in the charge as given, in this respect.

This brings us to the evidence. There was no evidence of an express agreement to extend the time for any fixed and definite period. On the contrary, Willis Lemon, the principal, who was sworn and examined in the cause, testified repeatedly in his examination, that no definite time had been agreed upon.

It may, we think, be assumed that the payment of interest in advance, whether at the rate specified in the note or at a higher rate, by the maker to the holder, and the receipt of the same by the latter, as interest, will imply an agreement to extend the time of payment during the period for which interest is thus paid. *Charlton v. Tardy*, 28

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Ind. 452; *Crosby v. Wyatt*, 10 N. H. 318; *New Hampshire Savings Bank v. Colcord*, 15 N. H. 119. But where there has been an agreement for extension generally, without any definite time, and interest has been paid in pursuance of the agreement, still if no interest has been paid in advance of being earned, there is nothing from which to imply an agreement to extend for any particular length of time. There was no evidence of the payment of any interest in advance, either at the rate specified in the note, or at an increased rate. To be sure, the interest for the year, during which the note had to run, was paid a short time before the note matured, at the increased rate. This was endorsed on the note as of the date of March 7th, 1860, the day the note matured. This payment could not operate as an agreement for an extension of time at all, because the note was not due until the end of the year for which the interest was paid.

The next payment made was twenty dollars. The evidence, outside of the indorsement on the note, does not fix the time when it was made. We therefore take the endorsement on the note as stating the true time. This, it will be seen by recurring to this endorsement, was June 22d, 1863. The note had then been on interest over three years after maturity, so that the payment then made was less than half the interest due at six per cent. There was a subsequent payment of three dollars, which was not indorsed on the note; and these were all the payments that were made. There was, then, no express agreement for extension for any particular and fixed length of time, nor were there any facts from which such agreement could be implied. The verdict, therefore, was in accordance with the evidence.

The appellant makes the point that it was error to grant the motion for a new trial as to Lemon, and overrule it as to the appellant, it being a joint motion.

The motion was rightfully overruled as to the appellant, and we think he cannot complain that it was granted as to Lemon. Whatever might be the law in such case as applied to a note joint only, the note in this case was joint and sev-

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eral, and an action could have been maintained upon it against the appellant alone. In such case as this, there was no error in the action of the court.

There is no error in the record, and the judgment must be affirmed.

The judgment below is affirmed, with costs.

HELM *v.* THE FIRST NATIONAL BANK OF HUNTINGTON.

CONSTITUTIONAL LAW.—*Conflict of Laws.* — *Patent.* — *Statute.* — *Promissory Note.*—The statute (3 Ind. Stat. 364) providing, that any person who may take any obligation in writing, for which a patent right, or right claimed to be such, shall form the whole or any part of the consideration, shall, before it is signed by the maker, insert in the body of the obligation above the signature the words “given for a patent right,” is unconstitutional and void, being in conflict with sec. 8 art. 1 of the constitution of the United States, which, from the nature and subjects of the power necessarily to be exercised, confers on Congress the exclusive power “to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors the exclusive right to their respective writings and discoveries.”

From the Huntington Circuit Court.

H. T. Helm and *N. O. Ross*, for appellant.

J. R. Slack, for appellee.

BUSKIRK, J.—This is an appeal from a judgment of the court below, rendered on a promissory note, to which the appellant, the defendant below, pleaded, in substance, that the said note was given for a patent right, or some interest in a patent; and that the said note was invalid and void, by reason of the omission to insert in the body of said note, above the signature, the words, “given for a patent right,” as required by a statute of the State of Indiana. 3 Ind. Stat. 364.

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By the second section of the act referred to, it is provided, that any person who may take any obligation in writing, for which a patent right, or right claimed to be such, shall form the whole or any part of the consideration, shall, before it is signed by the maker, insert in the body of the obligation, above the signature, the words, "given for a patent right."

The third section provides, that any person who shall take any obligation for a patent right, without complying with the requirements of this act, shall be deemed guilty of a misdemeanor, and subject to a penalty therein provided.

The purposes of this case do not require a further statement of the provisions of the act referred to.

To the plea of the appellant there was a demurrer, which was sustained by the court below, on which ruling judgment was rendered against the appellant.

The appellant assigns for error the decision of the court below, in sustaining a demurrer to the plea above set forth.

The case presents two questions:

1. Whether, under the provisions of such a statute as that which is above set forth, a note can be given and enforced, which does not contain the words required by such statute. And,

2. This involves the further question, which has been raised, of the constitutional validity of the statute itself, so far as the making and taking of a note for a patent right extend.

If the legislature of this State possessed the constitutional power to enact the law in question, there can be no doubt that a note taken in violation of its provisions would be illegal and void.

The solution of the second question depends upon whether the states have been prohibited by the federal constitution from legislating on the subject embraced in the act in question.

The eighth section of the first article of the constitution of the United States, which contains an enumeration of the powers granted to the federal government, confers on Con-

gress the power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

It is insisted by counsel for appellee that the above grant of power confers upon the national government the exclusive power to legislate on the subject of patents, and that consequently the legislature of this State possesses no power to legislate on the subject.

STORY, J., in delivering the opinion of the court in *Houston v. Moore*, 5 Wheat. 49, lays down certain rules of construction and interpretation which should be employed in determining whether a grant of "power to the national government is exclusive or concurrent." He says:

"The sovereignty of a state in the exercise of its legislation is not to be impaired, unless it be clear that it has transcended its legitimate authority; nor ought any power be sought, much less to be adjudged, in favor of the United States, unless it be clearly within the reach of its constitutional charter. Sitting here, we are not at liberty to add one jot of power to the national government beyond what the people have granted by the constitution; and, on the other hand, we are bound to support that constitution as it stands, and to give a fair and rational scope to all the powers which it clearly contains.

"The constitution containing a grant of powers in many instances similar to those already existing in the state governments, and some of these being of vital importance also to state authority and state legislation, it is not to be admitted that a mere grant of such powers in affirmative terms to Congress, does, *per se*, transfer an exclusive sovereignty on such subjects to the latter. On the contrary, a reasonable interpretation of that instrument necessarily leads to the conclusion, that the powers so granted are never exclusive of similar powers existing in the States, unless where the constitution has expressly in terms given an exclusive power to Congress, or the exercise of a like power is pro-

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hibited to the states, or there is a direct repugnancy or incompatibility in the exercise of it by the states.”

In *Gilman v. Philadelphia*, 3 Wal. 713, the rule is stated as follows: “The states may exercise concurrent or independent power in all cases but three:

“ 1. Where the power is lodged exclusively in the federal constitution.

“ 2. Where it is given to the United States and prohibited to the states.

“ 3. Where, from the nature and subjects of the power, it must necessarily be exercised by the national government exclusively.”

MARSHALL, Chief Justice, in delivering the opinion of the court in *Sturges v. Crowninshield*, 4 Wheat. 122, says: “In considering this question, it must be recollected that, previous to the formation of the new constitution, we were divided into independent states, united for some purposes, but, in most respects, sovereign. These states could exercise almost every legislative power, and, among others, that of passing bankrupt laws.

“When the American people created a national legislature, with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the states. These powers proceed, not from the people of America, but from the people of the several states; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument. In some instances, as in making treaties, we find an express prohibition; and this shows the sense of the convention to have been, that the mere grant of a power to Congress did not imply a prohibition on the states to exercise the same power. But it has never been supposed that this concurrent power of legislation extended to every possible case in which its exercise by the states has not been expressly prohibited. The confusion resulting from such a practice would be endless. The principle laid down by the counsel for the plaintiff, in this respect, is undoubtedly correct. Whenever the

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terms in which a power is granted to Congress, or the nature of the power, require that it should be exercised exclusively by Congress, the subject is as completely taken from the state legislatures, as if they had been expressly forbidden to act on it."

The same learned judge, in another portion of his opinion, uses the following language:

"It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the states."

The power in reference to patents and patent rights is not exclusively vested in the general government, nor is it prohibited to the states. The case does not therefore fall within the first or second class of cases, *supra*, but comes within the third.

The federal government has, continuously, from the adoption of the constitution down to the present time, legislated on the subject of patents and patent rights. Such legislation has covered the entire ground; for it has not only regulated the manner in which a patent may be obtained from the general government, but it has prescribed the manner in which such right may be sold and conveyed, and has imposed penalties for the infringement thereof. The power delegated to the general government having been exercised by Congress, and as from the nature and subject of the power it cannot be conveniently exercised by the states, it must necessarily be exercised by the national government exclusively. We are of the opinion that the legislature of Indiana possessed no power to pass the statute under consideration, and it must therefore be held unconstitutional and void. This ruling is in accordance with the adjudged cases upon the same and similar statutes. See opinion of DAVIS, Justice, in *Ex parte Robinson*, 3 Ind. Stat. 365, in which case the learned judge, in passing upon the validity of the statute in question, uses the following language: "The property in inventions exists by virtue of the

The Cincinnati, Richmond, and Ft. Wayne R. R. Co. *v.* Heaston *et al.*

laws of Congress, and no state has a right to interfere with its enjoyment, or to annex conditions to the grant. If the patentee complies with the law of Congress on the subject, he has a right to go into the open market anywhere within the United States and sell his property. If this were not so, it is easy to see that a state could impose terms which would result in a prohibition of the sale of this species of property within its borders, and in this way nullify the laws of Congress, which regulate its transfer, and destroy the power conferred upon Congress by the constitution. The law in question attempts to punish, by fine and imprisonment, a patentee, for doing with his property what the national legislature has authorized him to do, and is, therefore, void."

The judgment is affirmed, with costs.

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43	172
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THE CINCINNATI, RICHMOND, AND FORT WAYNE RAILROAD
COMPANY *v.* HEASTON ET AL.

DECEDENTS' ESTATES.—*Claims.*—*Heirs.*—A person who, not being excused by any statutory disability, fails to file his claim against a decedent's estate before final settlement, although such claim at the date of such settlement be not due, is barred of any right of action against the heirs of such estate, although they have inherited property from the decedent.

From the Randolph Circuit Court.

T. M. Browne and *J. P. Siddall*, for appellant.

E. L. Watson and *L. J. Monks*, for appellees.

PETTIT, J.—This suit was brought by the appellant against the appellees, on the 31st day of January, 1871, and this is the complaint in full.

"The Cincinnati, Richmond, and Fort Wayne Railroad Company complains of Nathaniel P. Heaston, Lewis L. Heaston, Edward Wright, and Mary Ann Wright, his wife,

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and say, that David Heaston, late of said county, died intestate, on December 18th, 1865, seized in fee of the following described real estate, situated in said county of Randolph, and State of Indiana, to wit:" (Here is a full description of the land given in the complaint.) "That said real estate descended to the children of said David, to wit, the defendants, Nathaniel P. Heaston, Lewis L. Heaston, and Mary Ann Wright, formerly Mary Ann Heaston, and since married to defendant Edward Wright, and said defendants still own and hold said real estate and are in possession thereof by descent from their said father; that said real estate is of the value of seventy-five dollars per acre; that on January 8th, 1866, said Nathaniel P. Heaston was duly appointed and qualified as administrator of the estate of said David Heaston, by the court of common pleas of said county of Randolph, and that on July 17th, 1869, he made his final settlement as such administrator and was duly discharged from his said trust by said court; that three thousand four hundred and eighty-five dollars and seventy cents of personal estate came into his hands as such administrator, and he filed vouchers for one thousand eight hundred and sixty-nine dollars and twenty-six cents, and paid the balance, one thousand six hundred and sixteen dollars and forty-four cents, to said defendants, as the only heirs of deceased, that amount being the surplus after payment of the widow's portion and of all indebtedness of the estate; that on the 16th day of March, 1864, said David Heaston executed to the plaintiff, by the name and description of the Cincinnati and Fort Wayne Railroad Company, his note, of which the following is a copy:

"\$1500.00.

March 16th, 1864.

"Whenever the Cincinnati and Fort Wayne Railroad Company cause the cars to run on the Cincinnati and Fort Wayne Railroad to Winchester, I promise to pay to the order of said Cincinnati and Fort Wayne Railroad Company the sum of fifteen hundred dollars, without relief from valuation or appraisement laws, provided said road is put in

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running order to Winchester on or before the 1st day of September, A. D. 1872, certificate of stock to be given on payment.

[U. S. stamp.]

DAVID HEASTON.⁴

"The plaintiff states that the said company caused the cars to run on said railroad to Winchester, for the first time, on August 10th, 1870, and that cars have run on the same ever since, and that said road is put in running order to Winchester; that at a meeting of the board of directors of said Cincinnati and Fort Wayne Railroad Company, held at their office on Thursday, July 5th, 1866, the following resolution was passed:

"*Resolved*, That the name of the Cincinnati and Fort Wayne Railroad Company be changed to that of the Cincinnati, Richmond, and Fort Wayne Railroad Company.'

"Which resolution was duly entered upon the records of said company, and said company caused a copy thereof to be recorded in the office of the recorder of the several counties through which the railway runs, and also gave notice thereof by publication in a newspaper of general circulation in this State; that defendants, though often requested to pay said note, refuse to pay the same, and it remains due and wholly unpaid. The plaintiff asks an order and decree of this court, that in default of payment of said one thousand and five hundred dollars and the interest thereon, said real estate, or so much as may be necessary to pay the same, may be sold, as lands are sold on execution at law and without appraisement, and the proceeds thereof be applied in payment of said note; and the plaintiff demands judgment for two thousand dollars, and for other proper relief."

There was a demurrer for want of sufficient facts sustained to this complaint, exception taken, and this ruling is the only assignment of error. Does the plaintiff, by this complaint, show a right to recover? We think not.

This suit was not brought under sec. 178, page 534, 2 G. & H.; because it does not show that the plaintiff was insane, an infant, or a non-resident of the State; and, therefore, this

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suit cannot be sustained against the defendants, as heirs of David Heaston, under this section. This suit could not be maintained against the administrator, even if he had not made final settlement, because the claim had not been filed in the common pleas court. *Hyatt v. Mavity*, 34 Ind. 415, and cases there cited; *Wilson v. Davis*, 37 Ind. 141. This claim was not due at the time final settlement of the estate was made by the administrator, but the statute makes ample provisions for such a case. 2 G. & H. 501, sec. 62. Had the appellant filed this note, the estate could not have been settled till August 10th, 1870; the time when the cars ran to Winchester, unless some one interested had given bond, as required by sec. 63, page 502, 2 G. & H. As long as any claim unsettled or not allowed remained against the estate, the settlement must and would have been postponed or continued until a final settlement could be made. 2 G. & H. 517, 518, secs. 112, 116. The statutes have made ample provision for the filing and collecting of claims, due or not due, against decedents' estates, and the plaintiff not having availed herself of these provisions, and not having brought herself within the provisions of sec. 178, p. 534, 2 G. & H., must be barred of any right of action against the appellees, as heirs of the maker of the note or agreement.

The judgment is affirmed, at the costs of the appellant.

DIETRICHs ET AL. v. SCHAW.

ARREST.—*Constable*.—A writ for an arrest issued by a justice of the peace and directed “to any constable of the county,” delivered to one not a constable or authorize him to make the arrest. To create him a special constable and justify him in making such arrest, the writ must be directed specially to him by name, and his appointment to act as such

43	175
127	320
43	175
132	252

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special constable, in that particular case, must be noted by the justice on his docket. In case of the non-compliance with these provisions of the statute, a party acting as special constable has no authority to act and cannot justify under the writ.

SAME.—*Citizen Acting under Officer.*—A citizen acting under such person cannot justify. It may be that where a known public officer calls upon a citizen to aid him in the execution of process, the citizen can justify under the officer, although the officer himself be guilty of a trespass; but where the party making the arrest is not a known public officer, but only assumes to act in the particular case by special appointment, persons aiding the supposed officer are bound to know whether he is authorized to make the arrest or not; and if in such case the party making the arrest is a trespasser for want of authority, those aiding him are also trespassers.

SAME.—Where a person is so illegally under arrest, a justice of the peace is also a trespasser in committing the person so arrested to prison, as he has not acquired jurisdiction over his person.

SAME.—*Liability of Judicial Officers.*—Judicial officers are not liable for mistakes of judgment or erroneous decisions, but they are liable for trespasses committed under color of judicial authority when they have no jurisdiction over the parties or the subject-matter.

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From the Marion Superior Court.

I. Klingensmith, for appellants.

J. P. Baker, J. W. Gordon, T. M. Browne, and *R. N. Lamb*, for appellee.

WORDEN, J.—We take the following statement of the facts in this case from the decision of the court below, it not being disputed that the statement is full and correct:

Dietrichs, as a justice of the peace, issued his warrant for the arrest of Schaw, the plaintiff in this case, to answer a charge of provoking one Smith to commit an assault and battery on him, Schaw, duly made under oath before said justice. The writ was directed "to any constable of Marion county," but instead of being delivered to a constable, it was handed by the justice to Charles G. Coulon, who appears in the subsequent proceedings under the name of a special constable.

Coulon arrested Schaw and brought him before the justice. Soon after he was brought into the office of the justice, the latter went to his dinner, Charles G. Coulon leaving at the same time. The justice and Coulon left the plaintiff

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in charge of Blume, who was a clerk in Dietrichs' office. While they were absent, the plaintiff started out of the office. Blume undertook to restrain him from going and called for help, whereupon Charles Coulon, who was prosecuting the "provoke" case, came out from his own into the justice's office, and ordered the plaintiff to sit down and behave himself until Esquire Dietrichs should return. Thereupon the plaintiff resumed his seat and awaited the return of the justice. The weight of evidence is, that Schaw was drunk when brought before the justice, and on his return the latter issued a mittimus for the commitment of the former to jail, reciting in the mittimus that the trial of the charge was necessarily postponed by reason of the drunkenness of Schaw, and he having failed to give bail for his appearance in the sum of fifty dollars, the jailer was commanded to receive said Christian Schaw into his custody in the jail of said county, there to remain until discharged by due course of law.

Schaw was kept in jail until the next day, when, on the order of justice Dietrichs, he was brought out, and the prosecution pending against him terminated in a finding of guilty and a nominal fine, with costs. No record was made of the proceedings in the docket of justice Dietrichs for more than a month afterward.

After his release Schaw brought this suit for the alleged arrest, assault, and imprisonment. Dietrichs filed a general denial and a second paragraph of answer, setting up the above recited proceedings before him against the plaintiff, as a defence.

The other defendants pleaded the general denial separately. Charles G. Coulon filed a second paragraph, justifying under the writ issued and delivered to him by the justice. The other defendants answered further in justification, that they acted as citizens under the command of Charles G. Coulon as special constable. The court at special term sustained demurrers to all the special answers, to which the defendants severally excepted.

Dietrichs et al. v. Schaw.

The cause was tried by a jury. Verdict against all the defendants for five hundred dollars damages. The defendants filed separate motions for a new trial. The plaintiff remitted two hundred and fifty dollars of the verdict, whereupon the court overruled the motions for a new trial, and rendered judgment on the verdict.

The only real question presented by the record is, did the writ delivered by the justice to Charles G. Coulon authorize him to arrest the plaintiff? If it did, the justice acquired jurisdiction of the person of the plaintiff, and such jurisdiction protected him from suit for subsequent irregularities; and the other defendants could justify under the writ. On the other hand, if the writ gave Charles G. Coulon no authority to make the arrest, he and all others acting in the premises under his orders, as well as the justice who committed the plaintiff to jail after his arrest, are trespassers.

The court below, at general term, held that the defendants were all trespassers and affirmed the judgment rendered at special term. The decision will be found reported in Wilson's Superior Court Reports, vol. 1, part 2, p. 153.

We are of opinion that the decision of the court below was correct, and that the judgment must be affirmed. Charles G. Coulon was not a constable and had no authority to make the arrest, unless he was specially appointed for that purpose in the manner provided for by statute.

In order to justify him in making the arrest, the writ must have been directed to him specially by name, and not to any constable of Marion county. Moreover, his appointment to act as a special constable in that particular case should have been noted by the justice on his docket. 2 G. & H. 607, sec. 110; 2 G. & H. 639, sec. 16. In the case of *Benninghoof v. Finney*, 22 Ind. 101, these requirements of the statute were held to be imperative, and not directory merely. It was also there held, that in the case of a non-compliance with these provisions, a party acting as a special constable had no authority to act, and could not justify his trespass under the writ. In the case under consideration, Charles G. Coulon

was a trespasser, having no authority whatever to arrest and detain the plaintiff. With respect to Charles Coulon and Blume, it is urged by counsel for the appellants that they can justify under Charles G. Coulon. It is said in the brief for appellants, that "a citizen justifying under an officer need not go any further than to show that he claimed or assumed to be an officer and acted as such; and that will be a complete defence to him." It may be that where a known public officer calls upon a citizen to aid him in the execution of process, the citizen can justify under the officer, although the officer himself is guilty of a trespass; as where the sheriff arrests a person not named in the warrant. *McMahon v. Green*, 34 Vt. 69. But this doctrine does not apply, as we think, to a case where the party making the arrest is not a known public officer, but only assumes to be authorized to act in the particular case by special appointment. In such case we think, as was held by the court below, that persons aiding the supposed officer are bound to know whether he is authorized to make the arrest or not. And, in such case, if the party making the arrest is a trespasser for want of proper authority, those aiding him are also trespassers. *Oystead v. Shed*, 12 Mass. 506; *Elder v. Morrison*, 10 Wend. 128; *Hooker v. Smith*, 19 Vt. 151.

The justice himself was a trespasser in committing the plaintiff to prison, inasmuch as he had acquired no jurisdiction over his person. It is not a case of error of judgment merely, but one of want of jurisdiction over the person of the defendant. Judicial officers are not liable for mistakes of judgment or erroneous decisions; but they are liable for trespasses committed under color of judicial authority, where they have no jurisdiction over the parties or the subject-matter. 2 Lead. Crim. Cas., 2d ed., p. 325.

The judgment below is affirmed, with costs.

The Ohio and Mississippi R. W. Co. *v.* Alvey.

THE OHIO AND MISSISSIPPI RAILWAY COMPANY *v.* ALVEY.

ATTACHMENT.—*Garnishee*.—A payment by a garnishee to a justice of the peace who had jurisdiction of the subject and the parties, in an attachment proceeding, is a defence to a suit by the attachment defendant against such garnishee for the same debt, although such attachment proceeding as between the creditor and debtor was irregular and reversible.

SAME.—Where the defendant in attachment is personally present in court, the garnishee is not required to question the jurisdictional legality of the proceedings or their regularity as to the defendant, nor is he in a condition to do so.

SAME.—Where the defendant in attachment is not personally before the court, the garnishee is required to examine and know that the court has jurisdiction of the subject of the action.

From the Knox Common Pleas.

W. H. DeWolf and *T. Gaslay*, for appellant.

C. M. Allen, *N. Usher*, and *W. R. Gardner*, for appellee.

BUSKIRK, J.—In this case but a single error is assigned. The action was upon an account for work and labor, the appellant being the defendant and the appellee the plaintiff. The appellant answered in three paragraphs: 1. The general denial. 2. Payment. The third paragraph alleges that suit was commenced by one James C. Montgomery in attachment against the appellee, before a justice of the peace of Hamilton county, in the state of Ohio; that in said proceeding the appellant was summoned as garnishee, and appeared and answered, stating the sum that the appellant owed the appellee; that by the order of the justice of the peace, the appellant as such garnishee paid to that officer the amount of such indebtedness; and that as a part of said paragraph there was filed a transcript, duly authenticated, of all the proceedings had before the justice, and also a copy of the law of the state of Ohio conferring upon justices of the peace in that state the jurisdiction, and prescribing the practice, in proceedings in attachment.

A demurrer was sustained to the third paragraph of the answer, to which ruling an exception was taken. The cause

was submitted to the court for trial, and resulted in a finding for appellee; and, over a motion for a new trial, judgment was rendered on the finding. The appellant has assigned for error the sustaining of the demurrer to the third paragraph of the answer, and this presents the only question for our decision.

The appellee has not furnished us with any brief, and consequently we are not informed as to what objections were urged in the court below to the sufficiency of the third paragraph of the answer; but we are informed by the brief of counsel for appellant, that it was insisted in the court below that the proceedings in the attachment suit were irregular, but in what respect we are unadvised.

We have carefully examined the law of the state of Ohio and the proceedings in attachment, and are satisfied that there was a substantial compliance with the law as it respects the appellee, and there seems to have been a strict compliance with the law as regards the appellant.

Section 2 of paragraph 7 of the statute confers upon justices of the peace authority to issue attachments and proceed against the goods and effects of a creditor in certain cases.

Section 28 prescribes what circumstances shall exist to entitle the plaintiff to an order for an attachment.

Section 37 provides when the order or summons may issue against a garnishee.

Section 38 prescribes the manner of the service upon the garnishee.

By section 39, the garnishee is required to appear before the justice and answer.

By section 40, it is provided, that the garnishee may pay the money owing to the defendant to the constable serving the summons, or into the justice's court, and, thereupon, he shall be discharged from any liability to the defendant for any money so paid, not exceeding the plaintiff's claim.

Section 42 authorizes the justice to order and compel the

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garnishee to pay into court the money due from him to the defendant.

It sufficiently appears from the copy of the statute of Ohio and of the proceedings in attachment, that the justice had jurisdiction of the subject and of the parties in said proceedings in attachment. In such case the garnishee is protected, although the proceedings as between the creditor and debtor are irregular and reversible. Where the defendant in attachment is personally present in court, the garnishee is not required, nor is he in a condition to question the jurisdictional legality of the proceedings, or their regularity as to the defendant; but where the defendant is not personally before the court, the garnishee is required to examine and know that the court has jurisdiction of the subject of the action. *Harmon v. Birchard*, 8 Blackf. 418; *Crake v. Crake*, 18 Ind. 156; *Schoppenhast v. Bollman*, 21 Ind. 280; *Richardson v. Hickman*, 22 Ind. 244; *Beard v. Beard*, 21 Ind. 321; *Drake Attach.*, sec. 711; *Ryan v. Burkam*, 42 Ind. 507.

It seems to be well settled by the above cited authorities, that the third paragraph of the answer constituted a defence to the action, and that the court erred in sustaining the demurrer thereto.

The conclusion reached in this case is not in conflict with the ruling in the case of *The Toledo, Wabash, and Western Railway Co. v. McNulty*, 34 Ind. 533.

In that case the money was paid by the garnishee voluntarily and without any order of the court, while in this the payment was compulsory, the garnishee being required by the order of the court to pay the money admitted to be owed into court.

In that case the affidavit required by the Ohio statute was not set out in the transcript, but in this the affidavit is in the transcript and complies with the requirements of the statute.

In that case it was not shown that the garnishee was "within the county where the action is brought," as is

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required by the Ohio statute. In this case it was shown that the garnishee was a corporation organized by the laws of the states of Ohio, Indiana, and Illinois, and that the principal office of such corporation was in the city of Cincinnati, county of Hamilton, and state of Ohio, that being the county where the action was brought.

In that case no process was served or publication made as to the principal defendant, while in this there was publication made of the pendency of the action.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to grant a new trial, and to overrule the demurrer to the third paragraph of the answer, and for further proceedings in accordance with this opinion.

THE INDIANAPOLIS, PERU, AND CHICAGO RAILWAY COMPANY v. ANTHONY.

43 183
138 315

CORPORATION.—*Liability for Acts of Agents.*—A corporation is liable for the wilful acts and torts of its agents committed within the general scope of their employment, as well as acts of negligence; and the corporation is thus bound, although the particular acts have not been previously authorized or subsequently ratified by the corporation. The act of the agent within the general scope of his employment is the act of the master, and if wrongful, the master is liable, although the act be unnecessary to the performance of the master's service, and was not intended for that purpose. The liability of the master does not depend upon the necessity of the act or the intent with which it was done, but upon whether the act was wrongful and within the general scope of the employment of the agent.

SAME.—*Railroad.—Evidence.*—In a trial for damages for the alleged wrongful ejectment of a passenger from a railway train, it is competent for a witness who was present to state what he heard said on the occasion of such expulsion, leaving it to others to identify the persons who made the statements.

DEPOSITION.—*Motion to Suppress.*—A court should not sustain a motion to sup-

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press the whole or a part of a deposition, if it would be admissible in rebuttal, although not admissible in the first instance.

IMPEACHMENT OF WITNESS.—In a deposition to impeach a witness, to the question, "Is that character good or bad?" the answer was, "It is bad anywhere, and always was; I would not believe him on oath." A motion to strike out all of this answer but the words, "It is bad," should have been sustained.

SAME.—When a female has testified to certain indecent conduct toward herself, evidence relating to her general character for truth, veracity, and chastity is admissible, to impeach her.

EVIDENCE.—*Railroad.—Ejection of Passenger.*—It is competent for a party who has been forcibly ejected from a railway train, in a suit for damages for such ejection, to prove what was the state of his health and the condition of his clothing shortly after his expulsion from the train, as tending to show the character of the treatment he received from the employees of the road and the danger to which he was subjected by reason of his sickness and exposure; but his own statements to a witness as to such condition of his clothing and what caused it are not admissible.

SAME.—*Harmless Error.*—Although evidence has been improperly admitted, the judgment will not for that reason be reversed, if the same facts were clearly and unmistakably proved by other competent testimony.

From the Howard Common Pleas.

D. Moss, for appellant.

J. O'Brien and *W. O'Brien*, for appellee.

BUSKIRK, J.—The appellee sued the appellant, to recover damages for his unlawful and wrongful expulsion from the cars of the appellant by her agents and employees in charge of such train of cars.

The complaint consisted of three paragraphs. The appellant moved to strike out certain portions of each paragraph, but the motion was overruled, and the exception is reserved by a bill of exceptions. The appellant demurred to each paragraph. The demurrers were overruled, and the appellant excepted, but the assignment of error only calls in question the correctness of the ruling as to the first and second paragraphs. The appellant answered in two paragraphs. Upon the motion of the appellee, the second paragraph was stricken out, and the question is presented by a bill of exceptions. Separate errors have been assigned upon the refusal of the court to strike out parts of

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the complaint, upon the overruling of the demurrer to the first and second paragraphs of the complaint, and upon the action of the court in striking out the second paragraph of the answer.

We do not deem it necessary to set out in full the several parts of the complaint sought to be stricken out. It will be sufficient to set out that portion of the third paragraph which was embraced in the motion, and which is as follows :

“He was taken hold of in a rude and violent manner by the conductor and other employees of the defendant in the said train, and was forcibly removed from his seat in a rough and violent manner, and was forcibly ejected from said car ; and that he was thrown and pushed from the step of said car, a distance of several feet, into a pit, commonly called a cow-pit, whereby he was greatly injured in manner and form as follows, to wit : by having his ankle severely sprained, so much so that he has since been unable to use the same ; and plaintiff avers that at the time of being ejected from the car of the defendant, he was greatly enfeebled and very weak from disease, so much so that he was wholly unable to resist the assaults of the agents of the defendant, or to protect himself from injury as aforesaid ; the plaintiff was then and there greatly hurt, bruised, and wounded, and became and was sick, sore, lame, and disordered, and so remained and continued to the time of the filing of this complaint, during all which time the plaintiff thereby suffered and underwent great pain, and was hindered and prevented from performing his necessary affairs and business, and was forced to and did pay, lay out, and expend five hundred dollars in and about endeavoring to be cured.”

The reason assigned for the motion was, that the portion above set out charges a wilful and malicious trespass on the part of the employees of the defendant, without showing the same was expressly authorized by the defendant, or that the defendant subsequently adopted or ratified said acts of said employees.

The substance of the second paragraph of the answer

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was, "that the said wrongful acts were not demanded or directed by the defendant or afterward ratified or adopted by the defendant, and that such wrongful acts of such conductor and other employees were unnecessary to the performance of the defendant's service, and were not really intended for that purpose, but the same were so done and performed wilfully and maliciously, in violation of their said duty, merely to gratify their own malice, through and under pretence of executing said employment, and not to serve the defendant."

The learned counsel for appellant has argued this question solely upon the theory that the acts performed by the agents of the appellant were wholly disconnected from the performance of their duty.

He says, "This question is presented on each of these rulings: 'Will an action lie against a master for the wilful and malicious trespass of a servant, not commanded or ratified by the master, but perpetrated to gratify the private malice of the servant, under mere color of discharging the duty which he has undertaken for the master?'"

Counsel for appellant denies that an action could be maintained under the facts and circumstances stated; and in support of such proposition, reference is made to *The Evansville and Crawfordsville Railroad Company v. Baum*, 26 Ind. 70, and adjudged cases in other states. The proposition, restricted and limited as it is, seems to be supported by the above case, but it does not state the question decided in that case or involved in the one under consideration. In the above case, the court, after stating the law to be as laid down in the above proposition, proceed to say: "It is not to be understood, however, that the master is never liable for the wilful and malicious acts of the servant, unless he has directed those specific acts to be done. The rule is not so broad as that. If the act of the servant complained of was necessary to be done to accomplish the purpose of the servant's employment—if it was essential as a means to attain the end directed by the master, and was intended for that

purpose, then it was implied in the employment, and the master is liable, though the servant may have executed it wilfully and maliciously. But when it is unnecessary to the performance of the master's service, and not really intended for that purpose, but is committed by the servant merely to gratify his own malice, though under the pretence of executing his employment, it is not done to serve the master, and is not, in fact, within the scope of the employment, and the master is, therefore, not liable."

The proposition as stated by counsel for appellant wholly disconnects the acts of the servant from the performance of any duty connected with his employment. In such case the servant would alone be responsible for his wilful and malicious acts; but the rule is otherwise, where the act performed by the servant comes within the general scope of his employment. In such case the master is liable, though the servant may have executed it wilfully and maliciously.

This view is fully supported and sustained by the recent decision in the case of *The Jeffersonville Railroad Co. v. Rogers*, 38 Ind. 116. In that case WORDEN, C. J., in speaking for the court, says:

"We think it is well settled that a corporation is liable for the wilful acts and torts of its agents committed within the general scope of their employment, as well as acts of negligence; and that the corporation is thus bound, although the particular acts were not previously authorized, nor subsequently ratified, by the corporation. Thus, in a late case, *Ramsden v. Boston and Albany R. R. Co.*, 104 Mass. 117, it is held that a railroad corporation is responsible for an assault and battery by the conductor of one of its trains upon a passenger in seizing or attempting to seize his property to enforce payment of fare. We quote the following passages from the opinion of the court in that case:

"A railroad corporation is liable, to the same extent as an individual would be, for an injury done by its servant in the course of his employment. *Moore v. Fitchburg Railroad Corporation*, 4 Gray, 465; *Hewett v. Swift*, 3 Allen, 420;

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Holmes v. Wakefield, 12 Allen, 580. If the act of the servant is within the general scope of his employment, the master is equally liable, whether the act is wilful or merely negligent; *Howe v. Newmarch*, 12 Allen, 49; or even if it is contrary to an express order of the master. *Philadelphia and Reading Railroad Company v. Derby*, 14 How. 468. The conductor of a railroad train, from the necessity of the case, represents the corporation in the control of the engine and cars, the regulation of the conduct of the passengers, as well as of the subordinate servants of the corporation, and the collection of fares. He may even eject a passenger for not paying fare. *O'Brien v. Boston and Worcester Railroad Company*, 15 Gray, 20. It has been adjudged by this court that if, in the exercise of his general discretionary authority, he wrongfully ejects a passenger who has in fact paid his fare, or uses excessive and unjustifiable force in ejecting a passenger who has not paid his fare, and injures him by a blow or kick, or by compelling him to jump off while the train is in motion; in either case, the corporation is liable.'

"We deem it unnecessary to cite further authorities upon this point. The principle lying at the foundation of the doctrine is as old as the common law, and is embodied in the maxim, *qui facit per alium, facit per se*, and is as applicable to corporations as to individuals. Doubtless, if a servant or agent commit a tort out of the scope of his agency or employment and not connected with it, the principal would not be liable therefor unless he previously authorized or subsequently ratified the act. Such, however, is not the case here."

The obvious purpose of the pleader was to bring the case within the rule stated in the case of *The Evansville, etc., R. R. Co. v. Baum, supra*. It is said in that case that if the act performed by the agent is "unnecessary to the performance of the master's service, and not really intended for that purpose, but is committed by the servant merely to gratify his own malice, though under the pretence of executing his

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employment, it is not done to serve the master, and is not, in fact, within the scope of the employment, and the master is, therefore, not liable."

By the above ruling the liability of the master is made to depend upon whether the act performed was necessary to the performance of the master's service, and whether the act was really intended for that purpose. The liability of the master is made to depend partly upon the necessity of the act, and partly upon the intent with which the act was done. The conductor of a railroad train has the right to eject a passenger for a refusal to pay his fare, or for indecent and disorderly conduct. The act of the conductor in ejecting a passenger, for either of the above causes, would come within the general scope of his employment, and the master would be liable, if the act was wrongful, without reference to the question of whether the purpose of the conductor was to serve his master or to gratify his private malice. The intent of the conductor should not have any influence upon the question of the liability of the master, where the act performed comes within the general scope of his employment. If, in the case supposed, the passenger refuses to pay his fare, or is guilty of indecent conduct, and the conductor for such cause ejects him from the train, the act would come within the general scope of his employment, and the master would not be liable, although the agent was actuated by private malice, because the conduct of the passenger justified the act. If, on the other hand, the conductor should be misinformed as to the conduct of a passenger and in reliance upon such information should eject him, the master would be liable, although the agent had no private malice, but was actuated solely by an earnest desire to serve his master. The act of the agent within the general scope of his employment is the act of the master, and whether the act was necessary to be done, will depend upon the facts surrounding it. If the act done is within the general scope of employment, and is wrongful, the master is liable, although the act was unnecessary to the performance

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of the master's service, and was not intended for that purpose. We therefore think that the liability of the master does not depend upon the necessity for the act or the intent with which it was done, but upon whether the act was wrongful and within the general scope of the employment of the agent. We are of opinion that the court committed no error in overruling the motion to strike out parts of the complaint or in sustaining the motion to strike out the second paragraph of the answer.

The only objection urged to the sufficiency of the first and second paragraphs of the complaint is, that "it is not shown in either that the appellant was under any obligations to transport the appellee from the city of Indianapolis to Noblesville, either with or without a ticket." The objection is very general and does not merit much consideration. It is alleged in the first and second paragraphs of the complaint, that the plaintiff purchased and paid for a ticket from Indianapolis to Noblesville, and had taken passage on the cars. In the first, the time and place of purchase are named. In the second, it is said that the plaintiff having purchased a ticket and taken passage on the cars as aforesaid, he was, etc.

We think there is nothing in the objection to the complaint.

The defendant moved to suppress the answers to the fourth and fifth questions in the deposition of Solomon Meaker, which were as follows:

"Question 4th. What do you know, if any thing, about a man being put off the train in the vicinity of James' Switch, on the evening referred to?"

"Answer. I was in the forward car; there was a fuss in the car behind me, some loud talk and swearing; heard talk of putting a man off the train; as I understood, the conductor had put a man off the train."

"Question 5th. State what protest, if any, was made by the man ejected from the train."

"Answer. I understood the conductor was accusing the

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man of feeling a woman's leg illegally, without her consent, and the man denied it; said he was not guilty; the conductor insisted on putting him off, and finally did put him off. The man stated he was sick, and did not want to be left there in the woods; he wanted to remain on the train until he got to Noblesville; did not see either of the parties; can't state the name of either; do not know whether it was the conductor or not."

The court overruled said motion, except as to the following portion of said motion: "I understood that the conductor was accusing a man of feeling a woman's legs illegally, without her consent."

We think there was no error in the ruling of the court. It was competent for the witness to testify to what he heard, leaving it to others to identify the persons who had made the statements.

The defendant moved to suppress the fourth question and answer in the deposition of Martin S. Barnhiser, which were as follows:

"Question 4th. State what conversation, if any, you had with the conductor above alluded to in regard to Francis M. Anthony having been put off the above named train, on the 13th day of August, 1869."

"Answer. Butler and I were on the train coming from Indianapolis. Shortly after occurrence the conductor came to us; his conversation was mostly with Butler; he was telling the circumstances over; he afterward said to me that in putting him off he either hesitated in his mind or stopped with him; he said Anthony protested his innocence; he said, damn it, if he was guilty he would have said the same; he said his plea of innocence was so short that it made him (the conductor) hesitate; said he thought in his own mind, that any person who would be guilty of such conduct would lie about it."

The motion was overruled, counsel for appellant has not pointed out any valid objection to the testimony, and we have not been able to see any. There was no objection

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made to the reading of the deposition of this witness in evidence. The court should not sustain a motion to suppress the whole or a part of a deposition, if it would be admissible in rebuttal, although not admissible in the first instance.

The defendant also moved to suppress the second question and answer in the deposition of R. R. Shield.

The question and answer were in substance the same as those above set out in the deposition of Barnhiser, and our ruling is the same.

The defendant also moved to suppress a portion of the answer to the fourth question in the deposition of James M. Brown.

The witness had been asked whether he was acquainted with the general character for truth and veracity of Solomon Essery, and had answered that he was. The fourth question and answer were then as follows :

“Question 4th. Is that character good or bad?”

“Answer. It is bad (anywhere and always was). I would not believe him on his oath.”

The motion was to strike out all the answer except the words “it is bad.”

We think the court should have sustained the motion, but we are unable to see how the appellee was injured by the refusal of the court to strike out the irrelevant portion of the answer; if the character of the witness was bad in the neighborhood of his residence, it could not be made worse by proving it was bad elsewhere.

The defendant also moved to suppress the sixth, seventh, and eighth questions and answers of the direct examination of Joseph Leatherman, and the third, fourth, fifth, sixth, and seventh questions and answers of the direct examination of the following named witnesses, to wit: Bowels, Anderson, Gassonway, Vallannigham, Deford, and Evans.

The above questions and answers related to the general character of Mrs. Elizabeth Essery for truth and veracity and chastity. Mrs. Essery had testified on behalf of the defendant, that she was in the same car with the plaintiff at

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the time he was put off the train ; that the plaintiff had put his arm under the seat, and had taken hold of her leg ; that she had informed the conductor of such train of such indecent conduct on the part of the plaintiff ; and that the conductor had for such conduct put the plaintiff off the train. The testimony objected to was offered for her impeachment. It was clearly competent and admissible.

The appellant also assigns for error the action of the court in suppressing, on the motion of appellee, the second and fourth questions and answers in the deposition of David Macy.

This assignment of error presents no question for our decision, for the reason that such questions and answers are not copied into the bill of exceptions. Such questions and answers having been stricken out, and not having again been put in the record by the bill of exceptions, we have no means of knowing what they were, and consequently presume that the ruling of the court below was correct.

The deposition of Macy read in evidence contains only the first and third questions and answers, the second and fourth having been previously stricken out.

The appellant has also assigned for error the overruling of the appellant's motion to suppress the third, fourth, fifth, and sixth questions and answers contained in the deposition of Joseph Fetrow, which are as follows :

"Question 3d. You may state what time in the night Mr. Anthony came to your house, and what was the condition of his health if you know."

"Answer. As near as I can recollect, it was between 8 and 9 o'clock when he came ; then he seemed to be suffering a great deal, and was complaining of his foot and ankle being bruised ; he asked if we had some warm medicine to give him, something hot. We made him pepper tea ; it didn't seem to do him any good ; he had some medicine he had got from Dr. Howard in town, and he took that."

"Question 4th. You may state, if you please, if you

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know, what disease he seemed to be laboring under; how long he remained at your house; and what his condition was during that time."

"Answer. He seemed to have the cholera morbus, and suffered very much during the night, and did not sleep any; he stayed with me all night and until six o'clock next morning, and he did not seem any better when he left me."

"Question 5th. You may state whether or not you examined his clothing, and if you did what was the condition of them."

"Answer. I noticed his clothing, and they were wet; I asked him how he got them wet, and he said they threw him into the 'cow-pit.'"

"Question 6th. If you know, state to what extent his clothing were wet."

"Answer. He was wet up to about his body."

It is necessary to a proper understanding of the testimony of this witness that we should copy the second question propounded to him and his answer thereto, which were as follows:

"Question 2d. You may state whether you are acquainted with the parties to this suit."

"Answer. I never saw Mr. Anthony until he came to my house to stay all night, some time in August, but don't remember just when it was. I have no acquaintance with the railroad company."

It was abundantly proved by other evidence on the trial of the cause, that the plaintiff, after being put off the train, applied at several houses for permission to stay all night, but was refused. Finally, he applied at the house of Mr. Fetrow, who consented to keep him over night. We think it was entirely competent for the plaintiff to prove what was the state of his health and the condition of his clothing shortly after his expulsion from the train, as tending to show the character of the treatment that he had received from the employees of the appellant and the danger to which he had been subjected by reason of his sickness and exposure. A

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portion of the answer to the fifth question should have been stricken out, and that reads as follows: "I asked him how he got them wet, and he said they threw him into the cow-pit."

But we cannot for that error reverse the judgment, because it was clearly and unmistakably proved by the testimony of other witnesses that the plaintiff, in getting off, or in being pushed off the train, fell into the "cow-pit," which was full of water, and got his clothing wet. The answer complained of did not injure the appellant. The error was a harmless one.

We think the court committed no error in overruling the motion to suppress the depositions.

It is next assigned for error that the court erred in overruling the motion for a new trial.

One of the reasons assigned for a new trial was the refusal of the court to give to the jury the fifth and sixth instructions asked by the appellant.

The fifth instruction was as follows: "If you further find from the evidence that the plaintiff was wrongfully expelled from the defendant's cars, but that the conductor and employees who so expelled him acted in good faith under the firm but mistaken belief that he was guilty of the indecent and disorderly conduct charged in the defendant's answer, he will not be entitled to recover vindictive or punitive damages against the company, unless they expressly or impliedly participated in the tortious act."

The above instruction presents, in substance, the same question as the one we have already considered and decided. The court was asked to say to the jury that the measure of damages did not depend upon the conduct of the conductor and other employees, but upon whether the company participated in the tortious acts of its employees. The instruction as asked ignores the fact that it was the duty of the conductor, when the appellee denied the charge of indecent conduct, to have made inquiry and ascertained the truth of the charge made against him. If the conductor acted in

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good faith and without malice or oppression, though he was mistaken as to the conduct of the appellee, and used no more force or violence than was necessary to eject the appellee from the cars, these matters properly went in mitigation of damages, and the jury were so charged by the court, but the measure of damages did not depend upon whether the company participated in or ratified the acts of its agents.

The sixth instruction asked and refused was as follows: "If the jury find from the evidence, that in fact, no physical force was actually used by the conductor of the defendant's train in expelling the plaintiff at the time complained of, but that the plaintiff carelessly sprained his ankle in stepping off the cars, the defendant is not liable for the consequences resulting to the plaintiff from that accident."

We think the instruction was properly refused, upon several grounds.

In the first place, it was charged in the complaint that the conductor and other employees, with force and violence, expelled the plaintiff from the cars, and it was proved that a brakeman was present and assisted the conductor. The instruction as asked limits the use of force to the conductor, thus ignoring the force which may have been used by other employees.

In the second place, there was no evidence which justified the instruction. The conductor and brakeman swore they did not use force, but in this they were contradicted not only by the witnesses of the plaintiff, but by some of the witnesses of the defendant. There was no evidence proving or tending to prove that the plaintiff was guilty of any carelessness or want of care in getting off the cars. As the plaintiff left the cars upon compulsion, and not voluntarily, the degree of care used should not be measured with great nicety. We think the court committed no error in refusing to give the fifth and sixth instructions asked.

Finally, it is earnestly insisted that the verdict was excessive and not sustained by the evidence.

We do not think so. We have carefully read all the evi-

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dence, and are entirely satisfied that it fully supports the verdict. The appellee was dangerously sick and was lying down on his seat. A female passenger informed the conductor that the appellee had put his arm under the seat and had taken hold of her ankle. When the appellee was informed of the charge, he promptly denied it. The conductor made no inquiry of other passengers, but stopped the train in the woods, in the night-time, and with the assistance of other employees forcibly ejected the appellee from the cars. The appellee fell into a cow-pit full of water and sprained his ankle. The appellee informed the conductor that he was very sick, and requested that he might be permitted to ride in the smoking car, but his request was refused, and he was ejected and compelled in his weak and enfeebled condition from sickness, and with a sprained ankle and wet clothes, to wander from house to house, in the night-time, and in a strange locality, seeking some place to stay. He was confined for several weeks by his ankle and put to much expense, besides his physical suffering and mental anxiety. It was very clearly proved on the trial that the appellee was not guilty of any indecent or improper conduct, which fact the conductor might have learned by inquiry. The zeal of the conductor was not tempered with wisdom and prudence.

We are not prepared to say that the verdict was, under the circumstances, excessive. We think it was fully justified by the evidence.

The judgment is affirmed, with costs.

THE CITY OF FORT WAYNE ET AL. v. CODY.

CITY.—Sewer.—Common Council.—The question of benefits to property in a city from the construction of a sewer having once been passed upon by the common council, no other court or tribunal has any power to review or pass

43	197
125	250
43	197
129	42
43	197
131	147
131	596
43	197
158	209

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upon it. The legislature has granted the sole power to try and decide that question to the common council, which acts judicially, and when it has determined by its estimate and assessment what property is benefited, and in what proportion, that decision is final and complete, and there is no power in any judicial tribunal to interfere, unless for fraud and corruption in making the assessment.

From the Allen Common Pleas.

A. Zollars and *R. S. Robertson*, for appellants.

W. G. Colerick and *H. Colerick*, for appellee.

BUSKIRK, J.—This is an action brought by Maurice Cody, appellee, against the City of Fort Wayne, her treasurer, and John Langohr, assignee of the original contractors for building a brick sewer on Barr street, in said city, which runs past the property of the appellee, to restrain and enjoin the execution and collection of a precept ordered by the common council for the cost of constructing the sewer, as against lots 2 and 584 of the original plat of Fort Wayne, owned by the appellee.

The principal questions raised and presented by the record are two in number, and may be stated as follows:

1st. Can the question of benefits to property from the construction of a sewer, after being ascertained and fixed by the common council of the city, be reviewed by any other tribunal? In other words, when the common council has ordered the construction of the sewer and provided for the payment of the cost thereof by an estimate assessing the same upon property deemed benefited thereby, in such equitable proportion as the council deem just, can any other court or tribunal review the question of benefit?

2d. Can the owner of property along the line of a sewer which is being constructed, who knows it is being constructed, and that the assessment is being made, stand quietly by and let the work proceed to completion, and then ask to enjoin the collection of the assessment? or is he not estopped from asserting that his property is not benefited?

These questions are raised by the demurrer to the com-

plaint, by the motion for a new trial, and by a motion in arrest of judgment by the appellants.

There is no question raised by the appellee as to the validity or regularity of the proceedings of the common council in making the estimate and assessing the benefits upon the property now claimed not to be benefited, and the collection of the assessment which is now sought to be enjoined; for, as we understand his complaint, the sole question upon which he relies is the one of benefit, which question he admits has been passed upon by the common council.

The provision of the charter under which the improvement is made is as follows:

“The common council shall have the power to enforce ordinances: * * 43d. To construct and regulate sewers, drains, and cisterns, and provide for the payment of the cost of constructing the same; to cause the same to be done by contracts, given to the best bidder, after advertising to receive proposals therefor; to provide for the estimate of the cost thereof, and the assessment of the same upon the owners of such lots and lands as may be benefited thereby, in such equitable proportion as the common council may deem just, which estimate shall be a lien upon such lots and lands, and may be enforced by sale of the same, in such manner as the common council may provide,” etc. 3 Ind. Stat. 88.

The position of counsel for appellant is stated as follows: “The first error assigned by us is, that the court erred in overruling a demurrer to this complaint; and we claim that the question of benefit having once been passed upon by the common council, no other tribunal or court has any power to review or pass upon it; that the legislature has granted the sole power to try and decide that question to the common council, which acts judicially, and when it has determined by its estimate and assessment what property is benefited, and in what proportion, that finding and decision is final and complete, and there is no power in any judicial

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tribunal to interfere, unless for fraud and corruption in making the assessment, which is not claimed.

"We cite, as fully sustaining the position, the following authorities:

"*Le Roy v. The Mayor, etc.*, 20 Johns. 430; *People v. The City of Brooklyn*, 23 Barb. 166; *Ex parte Mayor, etc., of Albany*, 23 Wend. 277; *Mooers v. Smedley*, 6 Johns. Ch. 28; *Commonwealth v. Woods*, 44 Pa. St. 113; *The Mayor, etc., v. Meserole*, 26 Wend. 132; *Motz v. City of Detroit*, 18 Mich. 495; *Owners of Ground, etc., v. Mayor, etc., of Albany*, 15 Wend. 374; *Lyon v. City of Brooklyn*, 28 Barb. 609."

We have examined the cases cited and find them in point, and in our opinion they sustain the position assumed.

In *Ex parte Mayor, etc., of Albany, supra*, where the statute provided that the assessment should be made upon the property benefited in proportion to benefits, the court after reviewing the previous decisions in a somewhat elaborate opinion, referring to the making of the assessment of benefits by the authorities, say, that "the execution of the duty is the fulfilment of a power so entirely discretionary, that so long as they are seen to have acted upon persons and a subject-matter within their jurisdiction, the proceeding is, in its nature, incapable of correction by certiorari. We have no power to look into this and like assessments. We cannot interrogate the functionaries appointed under the law as to the operations of their minds. We might otherwise send our writ to every assessor, every board of road commissioners, etc., to ascertain whether they have assessed A. or B. more or less than they should do." 23 Wend. 282.

And, in *The People v. The City of Brooklyn, supra*, where the same question arose upon the same statute, it was held, that "when it becomes a question of fact whether the proposed improvement will be advantageous to the property in any designated direction, the decision of the corporate authorities is conclusive." 23 Barb. 166.

The same ruling is followed in Pennsylvania, in the case of *Commonwealth v. Woods, supra*. There the council had

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power to levy and assess the cost of the sewer upon the property benefited, the assessment to be made by commissioners appointed for that purpose, and to be approved by the council. The question as stated by the court was, was the defendant precluded from the defence that the sewer was of no benefit to him, by the levy and assessment, and the approval of the same by the council? And the court say: "We think he was, for such are the express words of the law, and any other construction would open a door to an entire revision of the whole assessment." When the council has approved, the court holds that "the property benefited is fixed and ascertained, and the assessment and tax is complete; and the question of benefit cannot be reviewed by any other tribunal." 44 Pa. St. 117.

In the case of *Motz v. City of Detroit, supra*, Judge COOLEY, on page 515, states the question so clearly that we can do no better than quote his language. He says: "The complainants seek to have us review the decision of the council upon the facts, and to set aside their conclusion if in our judgment the evidence fails to support it. If the courts can interfere in this way, it is difficult to perceive at what point they are to stop, or what is to prevent their taking upon themselves the whole administrative power of the municipal governments. But it is plain they have no such authority. So long as the common council keeps within the limits of its jurisdiction, as defined by the constitution and statutes of the state, and its members are guilty of no intentional wrong or corrupt conduct in the discharge of their official duties, the courts have no power to control the exercise of their legal discretion, or to overrule and set aside their judgment; but must accept their conclusions as warranted by the facts, and as binding alike upon the city and upon all its inhabitants.

The legislature has provided for the assessment upon the property benefited in proportion to the whole cost, and the power of determining those benefits must be vested somewhere so that the rate will be uniform. There can be no

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review of that question by a jury without danger of overthrowing the whole provision for paying the cost. A man whose property has been assessed may call a jury which will assess it lower, or not at all. The balance of the cost would be thus thrown upon other property, and the several owners of such property would have their assessments reviewed and cut down; and the result might be that there would be no power to enforce the law and pay for the cost of construction. Every jury called would have a different view of the benefits, and each would act upon the individual case before it. The assessment is an entirety, and no courts or juries should be allowed to act upon it in detail. There is no provision in our statute for any review upon the question of benefits, and we must believe that the legislature intended (and wisely, we believe) that there should be none, in order that those contracting with the city for the construction of costly public improvements, extending, as they sometimes do, to great distances, and nearly always affecting a large number of lots and parcels, shall not have the risk of a costly litigation as to the question of benefits with every individual property holder upon the line or in the vicinity of the improvement.

The common council had before it the whole cost of the sewer, the position of each and every lot and parcel, and its relation to the sewer, with the advantages to be derived from it; while in the case at bar, the jury which is called to review the estimate made by the common council have nothing before them but the individual property of the plaintiff and the question of benefits to it, without regard to the whole cost and general benefits of the sewer.

The assessment made by a jury would not be the assessment provided by law, for that is to be made by the common council as an entirety, and not in parcels, as it must necessarily be if a separate jury is to act independently upon each separate lot to be assessed. Such a practice would open the door to much unnecessary litigation, without any corresponding benefit. If any review of the assessment is

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to be permitted, it should only be as an entirety, and not separated to be attacked and beaten in detail, as such a proceeding as this would accomplish.

The question involved here was fully considered and decided by this court in *The Mayor, etc., v. Roberts*, 34 Ind. 471.

We are very clearly of opinion that the appellee was not entitled to the relief sought, and that the court in overruling the demurrer to the complaint committed an error.

This conclusion renders it unnecessary for us to consider and decide the question of estoppel argued by counsel.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to sustain the demurrer to the complaint.

THOMASSON, ADMINISTRATOR, v. BROWN ET AL.

EXECUTOR AND ADMINISTRATOR.—Promissory Note.—Assignment.—If an administrator of an estate barter promissory notes of the estate and assign them for goods for his own use, it is a waste of the assets of the estate; and, if the assignee have knowledge, even from the nature of the transaction, that the administrator is thus acting in violation of his trust, the right of property in the notes is not divested, and he cannot hold the notes or profit by such purchase as against those rightfully entitled to them.

SAME.—It seems that, as our statute (2 G. & H. 528, sec. 159) authorizes a foreign executor or administrator to sue in the courts of this State, the bringing of evidences of debt by him to this State, from the foreign state in which administration has been granted, can not work a forfeiture of his title.

From the Lawrence Common Pleas.

E. D. Pearson, for appellant.

G. H. Voss, B. F. Davis, and J. A. Holman, for appellees.

WORDEN, J.—This was an action by the appellant against the appellees.

Issue, trial by the court, finding and judgment for the

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defendants, a motion for a new trial on behalf of the plaintiff having been overruled, and exception taken. As no question is made upon the pleadings, it will be unnecessary to notice them specially. The question presented is, whether the finding was justified by the evidence.

The material facts, as shown by the evidence, are briefly as follows: Polly McMillan formerly resided in the State of Indiana, but she removed to the State of Tennessee, where she became domiciled, and where she died. As part of her assets, she left two promissory notes for four hundred dollars each, executed to her by Madison M. Wingfield, secured by a mortgage, executed by Wingfield and wife, on certain real estate in Lawrence county, Indiana, where Wingfield and wife resided. On the death of Polly McMillan, John H. McMillan, one of her sons, took out letters of administration upon her estate in Tennessee, and brought the notes and mortgage to Indiana, where, without filing a copy of his letters in any court, or instituting any action for the recovery of the money due on the notes, he bartered them and the mortgage to the appellee, Brown, for a stock of groceries and liquors, together with Brown's right to the house (a short unexpired term) in which the liquors were situated, in Lawrence county, Indiana.

The value of the property received by McMillan from Brown is variously estimated, ranging from two hundred and fifty to eight hundred dollars. The property mortgaged by Wingfield and wife is shown to have been of a value nearly or quite sufficient to pay the notes and interest.

McMillan carried on the establishment awhile and finally sold it out. He testifies that he bought the saloon for himself. There does not appear to have been any fraud or collusion in the matter further than such, if any, as is to be inferred from the face of the transaction. It may be observed that it appears clearly that Brown knew, when he bought and took an assignment of the notes and mortgage, that they belonged to the estate of Polly McMillan, and that the only authority which John H. McMillan had to assign them

was derived from his letters of administration. John H. McMillan never settled his administration in the court in Tennessee from which he derived his letters, nor did he account for the proceeds of the sale of the notes, but he tendered his resignation as such administrator, and it was accepted.

Brown foreclosed his mortgage against the Wingfields, making some purchasers of the equity of redemption parties, in the Lawrence Court of Common Pleas, and took personal judgment against Wingfield for any residue after exhausting the mortgaged premises.

Afterward, the present appellant, Thomasson, took out letters of administration in Lawrence county, Indiana, upon the estate of Polly McMillan, and filed the complaint herein, to set aside and declare void the assignment of the notes and mortgage, and for other special and general relief. All the necessary parties seem to have been before the court, in order to entitle the plaintiff to whatever relief may have been proper.

It may admit of some question whether John H. McMillan had any right, whatever, to sell and assign the notes and mortgage in Indiana by virtue of the administration granted to him in Tennessee. "In regard to the title of executors and administrators, derived from a grant of administration in the country of the domicil of the deceased, it is to be considered that the title cannot, *de jure*, extend, as a matter of right, beyond the territory of the government which grants it, and the movable property therein." Story Conflict of Laws, sec. 312. Conceding that the title to the notes and mortgage vested in McMillan in Tennessee, where administration was granted to him, the question arises whether the title still continued in him when he brought them to Indiana, and whether he could here transfer them, so as to vest a title in the assignee. In the case of *Kilpatrick v. Bush*, 23 Miss. 199, it was held that an administrator, by removing the effects of his intestate beyond the limits of the state in which the administra-

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tion was granted, forfeits his title to the property, and cannot sue in another state in his own name, for the recovery of such property. The property involved in that case was not notes or bills of exchange or other evidence of debt. Inasmuch as our statute authorizes a non-resident executor or administrator to sue in the courts of this State (2 G. & H. 528, sec. 159), it would seem that bringing evidences of debt here from the state or country in which administration was granted could not work a forfeiture of the title of the administrator.

We have concluded not to decide or intimate any opinion upon the question whether the Tennessee administrator could legally transfer the notes and mortgage in Indiana, inasmuch as the case must be decided for the appellant on other grounds, conceding such right to the foreign administrator.

Conceding the same right to the foreign administrator to collect and receive payment on the notes, and to assign and transfer them, as if he had been a domestic administrator, the question recurs whether the transfer in this instance can be upheld. We are clearly of opinion that it cannot. The bartering of the notes for the stock of groceries and liquors was clearly a breach of the duty of the administrator. It was a waste and a squandering of the assets. Brown, the purchaser, had full knowledge, from the nature of the transaction, that the administrator was acting in violation of his trust, and he cannot profit by his purchase, or hold the notes against those rightfully entitled to them. It may be admitted that under proper circumstances an executor or administrator may sell and transfer notes and bills due to his intestate. But in no case can he barter them for his own use, as was done in this case.

The authorities upon this question are clear and conclusive. In the case of *Miller v. Helm*, 2 Sm. & M. 687, Chief Justice SHARKEY, in delivering the opinion of the court (p. 696), uses the following language:

“The administrator, being the legal holder of negotiable

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paper due the estate, may transfer it for legal purposes, and his indorsee will hold it. But an administrator can do no act lawfully, which is a breach of his duty. He is to administer, by paying the debts, and taking care of the estate; but he cannot convert it to his own use, and if he should do so, the right of property is not divested. He cannot appropriate the assets to the payment of his own debts, nor to the purchase of property for himself. But being the legal holder of negotiable paper, he may transfer it; and if his indorsee be innocent, and not chargeable with connivance, he will hold it. If, on the other hand, the indorsee knows that such appropriation is illegal, then he cannot hold it. And as an administrator cannot appropriate such paper to the payment of his own debts, or to the purchase of property for himself, without a violation of duty, the indorsee who takes it for such purposes, knowing that it is a part of the assets, is a participant in the fraud, and cannot be allowed to profit by it."

In *Colt v. Lasnier*, 9 Cow. 320, the Chief Justice, after reviewing the cases, sums up the law on this subject as follows: "It seems to me, therefore, the correct rule, both in England and in this State, is, that any person receiving from an executor the assets of his testator, knowing that this disposition of them is a violation of his duty, is to be adjudged as conniving with the executor; and that such person is responsible for the property thus received, either as a purchaser or a pledgee."

In *Prosser v. Leatherman*, 4 How. Miss. 237, it was held to be a good defence to an action on a promissory note, that the note belonged to the estate of a deceased person, and that the plaintiff received it of the administrator in payment of an individual debt due by the latter, or in exchange for other property, with full knowledge of the fact.

In *Miller v. Williamson*, 5 Maryland, 219, it was held, that if a party dealing with an executor has reasonable ground for believing the executor intended to mis-

Turner *et al.* v. Rehm.

apply the money, or was in the very transaction applying it to his own private use, he can take no advantage from the operation. See, also, the cases of *Pinckard v. Woods*, 8 Grat. 140, and *Talbott v. Dennis*, 1 Ind. 471.

We are satisfied that Brown must be regarded, from the character of the transaction, as having notice that the sale thus made to him was a breach of the duty of the administrator, and that therefore he can take nothing by his purchase. The plaintiff was entitled to relief, but whether he can be put in the position of Brown and enabled by the judgment of the court to proceed and collect the judgment which Brown has obtained, or whether he must proceed to foreclose the mortgage against the Wingfields, is a question which is not before us. A new trial should have been granted.

The judgment below is reversed, with costs, and the cause remanded.

BUSKIRK, J., having been of counsel in the foreclosure cause of *Brown v. Wingfield*, did not participate in the decision of this cause.

TURNER ET AL. v. REHM.

LIQUOR LAW.—*License.*—*Appeal.*—An application for a license to sell intoxicating liquors, under the act of March 5th, 1859, was refused by the county commissioners, and the applicant appealed to the circuit court, from the decision of which court certain remonstrants appealed to this court.

Held, that under the act of 1861, the decision of the circuit court was final, conclusive, and without appeal to the Supreme Court.

From the Dearborn Circuit Court.

S. R. Downey, J. D. Haynes, and J. K. Thompson, for appellants.

J. Schwartz, for appellee.

BUSKIRK, J.—The appellee applied to the board of com-

missioners of Ohio county for a license to retail intoxicating liquors in a less quantity than a quart at a time, under the provisions of the act of March 5th, 1859.

A remonstrance was filed by a portion of the inhabitants of the township in which the business was to be conducted, remonstrating against the granting of such license.

The board of commissioners refused to grant the license, and the applicant appealed to the circuit court.

In the circuit court, the venue was, upon the application of the appellee, changed to the Dearborn Circuit Court.

In the latter court, a motion to dismiss the case, upon the ground that no sufficient appeal bond had been filed, was overruled, and a motion to reject and strike out the remonstrance because it did not conform to the statute was sustained; and thereupon an application was made for leave to file another remonstrance, which was overruled. Proper exceptions were taken to all of these rulings.

The cause was tried by the court and resulted in a finding for the appellee, and the court, over a motion for a new trial, rendered judgment on the finding.

The remonstrants appeal.

The appellee has filed a written motion to dismiss the appeal, because the decision of the court, below is final, from which no appeal lies; and in support of this motion we are referred to the case of *The State v. Vierling*, 33 Ind. 99.

The counsel for appellants insist that the above case cannot be regarded as authority in this, because in the present case there was no trial by jury.

We do not think that the act of 1861 is susceptible of such a construction. Such act, after providing for an appeal by either party aggrieved, proceeds thus: "Either party to such appeal to the circuit court or court of common pleas, may demand and have a trial by jury in said circuit court or court of common pleas, and the decision or verdict of such jury shall be final and conclusive, and without appeal therefrom." 3 Ind. Stat. 330, sec. 2.

Turner *et al* v. Rehn.

There is manifestly an omission in the above act. The true reading of it should be, and the decision of the court or verdict of such jury shall be final and conclusive and without appeal therefrom. The right of trial by jury is given, but it is not compulsory. Either party may demand a jury trial, but the parties may waive a jury trial. We think the intention of the legislature was to make the decision in the appellate court final and conclusive, without reference to the mode of trial.

It is, however, insisted by counsel for appellants, that it has been held by this court that an appeal could have been taken from the board of commissioners to the circuit court or common pleas court independent of the act of 1861. *Wright v. Harris*, 29 Ind. 438. But the ruling in the above case was virtually overruled, on that point, in the subsequent case of *Bosley v. Ackelmirr*, 39 Ind. 536.

But conceding that the right of appeal, as given by the act of 1861, to the circuit or common pleas court might have been exercised independent of such act, this concession would not give a right of appeal from the circuit or common pleas court to this court. The giving of an appeal by the statute did not take away the common law right. The act of 1861 does not stop with giving an appeal to the circuit or common pleas court, but it in express terms provides, that the decision in such court shall "be final and conclusive and without appeal therefrom." While such act may be only declaratory of the common law, so far as the right of appeal from the board of commissioners to the circuit or common pleas court is concerned, it in express terms takes away all right of appeal from the circuit or common pleas court to the Supreme Court. Under the decision in *Wright v. Harris*, *supra*, the appeal to the circuit or common pleas court may be taken under the statute or at common law, for the giving of a new right by statute does not take away a right existing at common law. The new remedy is cumulative only; but where a statute prohibits the doing of any thing

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that was previously lawful, such right is taken away and can no longer be exercised.

We are quite clear that no appeal lies in this case to this court.

The appeal is dismissed, at the costs of the appellants.

ATHERTON v. TONEY ET AL.

48	211
180	378
48	211
181	456

MORTGAGE.—Equity of Redemption.—Set-Off.—Vendor and Purchaser.—The assignee of an equity of redemption, who accepts a deed without covenants for the mortgaged estate, takes it charged with the mortgage debt. In the absence of a special contract, or without some special circumstances, the purchaser must be held to take the land charged with the incumbrance. He cannot pay off the debt, and then keep it alive by taking an assignment of it to himself, and set it off against an unpaid balance he may still owe his vendor on his purchase.

From the Putnam Circuit Court.

S. Turman and *J. Birch*, for appellant.

OSBORN, J.—This was an action brought by the appellant against the appellees upon a promissory note for three hundred dollars. The complaint is in the usual form. The appellees filed separate answers, each alleging that Toney was the principal and Miller surety in the note. Toney pleaded in his answer, by way of set-off, a note for three hundred and fifty dollars executed by the appellant to Solon Turman, and by him assigned to the appellee, Toney, before the commencement of the action, upon which there was due a sum more than equal to the amount of the note and interest sued on. To that answer, the appellant filed a reply of two paragraphs. The appellees demurred to each paragraph on the ground that it did not state facts sufficient to constitute a reply. The court sustained the demurrer to the first paragraph and overruled it to the second. Exceptions were taken to both rulings, but as no cross errors

Atherton v. Toney et al.

have been assigned, we need not notice the second paragraph. The cause was tried by the court, resulting in a finding for the appellees; and, over a motion for a new trial, judgment was rendered on the finding.

The errors assigned are, in sustaining the demurrer to the first paragraph of the reply, and in overruling the motion for a new trial.

The first paragraph of the reply alleges that on the 2d day of January, 1869, said plaintiff sold and conveyed, by deed, to defendant Toney, without warranty, certain lands therein described, then owned and in the possession of plaintiff; that the note sued upon was executed in part payment of the purchase-money of said lands, and for no other or different consideration; that before and at the time of said sale and purchase, there was existing upon said lands a mortgage to the Sinking Fund of the State of Indiana for the sum of five hundred dollars, which was a lien thereon; also, that on the 7th day of December, 1868, said plaintiff being indebted to Solon Turman in the sum of three hundred and fifty dollars, executed the note sought to be set off in defendant's answer, and also on said day executed to said Turman a mortgage on said lands, to secure the payment thereof, which said mortgage was duly recorded on the 16th day of December, 1868, and was a valid lien on the land sold to Toney, at the time of said sale and conveyance, of all of which facts Toney had full and actual knowledge; that with said knowledge Toney purchased the lands, taking a deed therefor without covenants of warranty, and executed the note sued upon, to secure the payment of part of the purchase-money thereof; that afterward Turman brought suit to foreclose the mortgage; that pending said suit, and to prevent the foreclosure and the sale of the lands, and to secure the dismissal of said suit, Toney offered to and did pay Turman three hundred and forty-five dollars, in consideration of which Turman agreed to and did dismiss his suit, and assigned said note and mortgage to Toney; that said purchase of said note and mortgage by Toney operated as a discharge and

satisfaction thereof; that it was the payment of the debt he was bound to discharge, to remove a lien on his said lands; that it would be inequitable and fraudulent to permit him to set off the same against plaintiff's note. It is further alleged in this paragraph, that in pursuance of said sale, plaintiff delivered to Toney the possession of said lands; that said Toney and Miller, his grantee, have ever since held, and still hold the quiet and peaceable possession thereof.

The question presented by the first paragraph of the reply is this: does the assignee of an equity of redemption, who accepts a deed for the mortgaged estate, without covenants, take it charged with the payment of the mortgage debt? It seems to us that, in the absence of a special contract, or without some unusual circumstances, the purchaser must be held to take the land charged with the incumbrance, and to allow him to pay off the debt and then keep it alive by taking an assignment of the obligation which the mortgage was given to secure, would be contrary to equity. We think we may fairly presume, in the absence of any evidence showing the contrary, that the amount paid was the price of the property purchased, after deducting the amount of the mortgage, and, in the language of the court in *Shuler v. Hardin*, 25 Ind. 386, it would be for the purchaser, and not the seller, to look to the discharge of the incumbrance. In *Starr v. Ellis*, 6 Johns. Ch. 393, it was said: "A court of equity will keep an incumbrance alive, or consider it extinguished, as will best serve the purposes of justice, and the actual and just intention of the party," and that the general rule is, that the union of the legal and equitable estates will create a merger of the two, unless there be some beneficial purpose, or some declared intent to prevent it. And the purpose to keep it alive must be an innocent one and injurious to no one. In *Tice v. Annin*, 2 Johns. Ch. 125, Chancellor KENT said: "If a judgment creditor, other than the mortgagee, sells the equity of redemption, the mortgagor reaps the benefit of that equity, by having it applied toward the payment of his other debts, and the mortgage debt remains,

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without any confusion, as a distinct and separate incumbrance; and if the mortgagee, in such a case, should elect to proceed against the original debtor at law, instead of seeking to foreclose his mortgage, and should endeavor to collect his money of other property of the mortgagor, this court must either stay such a proceeding, or compel him, upon payment, to assign over his debt and security to his debtor, so as to enable the debtor to indemnify himself out of the mortgaged premises. The one course or the other would be indispensable to prevent the purchaser of the equity from obtaining and holding the whole interest in the land, when he purchased, and paid only the value of, the equity of redemption. If the mortgagee himself, as in the present case, sells the equity of redemption by execution at law, to satisfy the very debt for which the mortgage was taken, and he then proceeds at law against the mortgagor's person, or other property, for the residue of the debt unsatisfied by the sale of the equity, or if the whole debt was satisfied by the sale of the equity, the same consequence must follow. He must, at all events, on being paid, assign over to the mortgagor the bonds and mortgage, to enable him to compel the purchaser of the equity to refund him the debt out of the land charged. If, however, the mortgagee, as in this case, has put it out of his power to assign, by placing the whole debt and security in the hands of the purchaser, a new and greater difficulty arises. To allow the purchaser to go on and compel the mortgagor to pay the mortgage debt to him, and then to compel him to assign over the mortgage to the mortgagor, so as to enable him to recover the money back again, would be an idle and absurd proceeding.

“There seems to be no other alternative, but to consider the debt as extinguished in the hands of the purchaser. He purchased only the equity of redemption, and, of course, subject to the mortgage debt, and his purchase of that debt was nothing more than an extinguishment of the incumbrance upon his land.”

In that case, the equity of redemption had been sold on

execution. In the case at bar, it was sold by the owner, and the note in suit was given for the purchase-money. To allow the appellee, Toney, to buy in the outstanding obligation, to secure which the mortgage was given, and use it as a set-off against a note given for the purchase-money, would enable him to hold the whole interest in the land, when he purchased only the equity of redemption. It would give him the benefit of a covenant against incumbrances when none was made. It would enable a purchaser of an equity of redemption on a credit, at a price equal to an outstanding mortgage given to secure a note or other personal obligation of the seller, to defeat the collection of the purchase-money by buying up and taking an assignment of the debt and using it as a set-off, and thus secure the property at one-half of the purchase price. That would not be for an innocent purpose. Toney paid the debt to relieve his own land from an incumbrance existing at the time of his purchase, and for the payment of which, by the terms of his purchase, the land was the primary fund. If the appellant had been compelled to pay the debt, he could have required the holder to assign the mortgage to him, to enable him to subject the land to the repayment of the money. Or without such assignment he could have subjected the land to the repayment of the amount. The decision of the court below sustaining the demurrer was erroneous, and for that cause the judgment must be reversed. This renders a consideration of the questions arising on the motion for a new trial unnecessary.

The judgment of the said Putnam Circuit Court is reversed, with costs. The cause is remanded to said court, with instructions to grant a new trial and overrule the demurrer to the first paragraph of the reply, and for further proceedings in accordance with this opinion.

 Spurgeon v. Scheible *et al.*

SPURGEON v. SCHEIBLE ET AL.

WILL.—Construction.—A will recited as follows: "I direct, first, that my brother," S., "be requested and entrusted with six hundred dollars of the money which I now have, for the purpose of purchasing by entry wild lands in the State of Missouri or Iowa, as he may think proper, for my heirs, equally dividing and entering the lands in their several names, to wit," etc. "I also direct that the whole of my real and personal estate, except as hereinbefore mentioned, shall be and remain the absolute property of my beloved wife, so long as she remains my widow, and that she have the entire control of the same as she may seem proper; and if provided she shall marry, then I direct that an administration shall be had upon all my estate, except as beforesaid, and that the same be distributed according to law."

Held, that the estate here created was a fee simple to the wife.

SAME.—Partial Intestacy.—A construction of a will which would result in partial intestacy is to be avoided, unless the language of the will is such as to compel such construction.

From the Bartholomew Common Pleas.

F. T. Hord, for appellant.

S. Stansifer, for appellees.

DOWNEY, C. J.—Jacob M. Scheible commenced his action in the court below against appellant and Joseph A. Spurgeon, and avers that Milton Spurgeon departed this life testate, and that his will was admitted to probate on the 6th day of March, 1854, in Bartholomew county. The will purports to have been executed January 14th, 1854, and the complaint avers that the will devised to appellant, the widow of deceased, the land described in the complaint so long as she remained his widow, and thereby bequeathed to her a life estate only; that the testator left six children whose names are given; that thereafter two of said children died, leaving appellant, their mother, and the other brothers and sisters their heirs; that appellant was the owner of a life estate by virtue of the will and a fee simple interest in one-sixth as heir of her deceased children; and that Joseph A. Spurgeon is the owner in fee simple, as heir of his father, of an undivided one-sixth part, and of one-fourth of one-sixth as heir of his deceased sisters; that said Joseph

43	216
133	306

43	216
145	136

43	216
159	118

43	216
171	385

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A. Spurgeon, on the 27th of February, 1869, executed to said Scheible a mortgage on his undivided interest in said land, to secure a note made by him to said Scheible, and demands a foreclosure of said mortgage, etc. A copy of the will is made a part of the complaint. Appellant filed a demurrer to the complaint, for the reason it did not state facts sufficient to constitute a cause of action against her. The court overruled the demurrer, which action presents the first alleged error. The will referred to in the complaint is as follows :

"I, Milton A. Spurgeon, of Bartholomew county, State of Indiana, do make and publish this, my last will and testament. First, that my body be decently interred, in a neat, plain manner, and as to such worldly estate as it has pleased God to entrust me with, I dispose of the same in the following manner, to wit: I direct, first, that my brother, Granville Spurgeon, be requested and entrusted with six hundred dollars of the money which I have now, for the purpose of purchasing, by entry, wild lands in the State of Missouri or Iowa, as he may think proper, for my heirs, equally dividing and entering the lands in their several names, to wit: Robert, Sarah Jane, Joseph Allen, James Franklin, Damiza Ellen, and Milton Albert. I also direct that the whole of my real and personal estate, except as hereinbefore mentioned, shall be and remain the absolute property of my beloved wife, so long as she remains my widow, and that she have the entire control of the same as she may seem proper; and if, provided she shall marry, then I direct that an administration shall be had upon all my estate, except as beforesaid, and that the same shall be distributed according to law; and I hereby make and ordain my beloved wife, Louisa D., executrix of this my last will and testament."

The court having overruled the demurrer filed to the complaint, appellant filed the following answer and cross complaint: "That she was the wife and is now the widow of Milton A. Spurgeon; that he died the owner in fee sim-

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ple, on the — day of —, 1854, of the land described in complaint, which was all the land owned by him at any place; that under and by virtue of said will, she was invested with the fee simple of all said property, and under and by virtue thereof, she is the owner of said land in fee simple; that she has not since conveyed said property, or any portion thereof, or authorized the same to be done; that said Joseph A. Spurgeon has no interest of any kind in said land, and had no interest therein of any kind at the time of making said mortgage, and said mortgage passed no right to or lien in or to said land, or any portion thereof to plaintiff, but the same is a cloud on this defendant's title; and prays that no judgment be entered on said mortgage, and that the same be cancelled and set aside as a cloud on defendant's title," etc.

To this answer and cross complaint, appellee Scheible filed a demurrer, for the reason it did not state sufficient facts. The court sustained the demurrer, and this is the second alleged error committed by the court.

The whole case rests on the construction of the will. If appellant has a fee simple title, as she claims, and not a life estate only, then the rulings of the court on the complaint and on the answer are wrong.

As will be seen, the testator first directs the sum of six hundred dollars to be placed in the hands of his brother, to be invested in lands in Missouri or Iowa, to be equally divided among his heirs, whom he names. Then follows the clause making provision for his wife, on which the question arises in this case. He directs that the whole of his real and personal estate, except as before mentioned, shall be and remain the absolute property of his wife, so long as she shall remain his widow, and that she shall have the entire control of the same, as to her may seem proper. But it is provided that if she shall again marry, then administration shall be had upon his estate, except as aforesaid, that is, as we suppose, except as to the six hundred dollars to be

invested in lands by his brother, and that the same shall be distributed according to law.

We suppose that the words, "shall be and remain," are sufficient to vest in the wife an estate of some duration in the lands and personal property. There is no question to the contrary made in this case. It seems to us that in this case there is no limitation or condition imposed by the testator upon the estate, except that the devisee shall remain his widow. Whether this condition should be held void under our statute or not is not a question in this case, for the widow has not violated it, or if she has the fact is not shown. The statute to which we refer provides, that "a devise or bequest to a wife with a condition in restraint of marriage shall stand, but the condition shall be void." 2 G. & H. 552, sec. 2. If there might be a devise during widowhood, which would be regarded as an estate limited in its duration to that period, and not as an estate upon condition, we think this is not such a devise. We regard the estate here created as an estate in fee simple to the wife, upon the condition subsequent that she shall not again marry. If the testator had not intended to give the fee, he would hardly have used such strong language as he did in describing the estate which should be taken. It was to remain "the absolute property" of his wife, and she was to have "the entire control of the same as to her might seem proper." It also seems reasonable that if he had intended that his wife should have but a life estate in any event, he would, as he seems to have intended to dispose of all his estate, have made some disposition of the reversion after the determination of the life estate. As he had made some provision for his children, and supposed, at least, that by the condition he had guarded against the loss of the estate by a second marriage of his wife, he probably expected that such part of his estate as might not be necessary for her support would, at her death, go to his children by descent directly from her. The language of the will seems to us such as a non-professional person would probably use to create an estate in fee

Harper *et al.* v. Keys.

simple upon the condition that the devisee should not again marry. A construction which would result in partial intestacy is to be avoided, unless the language of the will is such as to compel such construction. *Cate v. Cranor*, 30 Ind. 292. To hold that the wife had only a life estate, would be to hold that as to the reversion the testator died intestate. That much of his estate would not be controlled by the will, but would descend to his heirs.

The judgment is reversed, with costs, and the cause remanded, for further proceedings in accordance with this opinion.

HARPER ET AL. v. KEYS.

43 220
130 148

ATTACHMENT.—*Liability on Bond.*—The statute does not require, in order to give the defendant in an attachment proceeding an action on the undertaking, that there should have been an issue made on the affidavit and a finding in favor of the defendant thereon.

SAME.—There may be two results in an attachment proceeding without any issue upon the affidavit, either of which would entitle the defendant to his action upon the undertaking; first, when the plaintiff has failed in his action, and the proceeding is wrongful and oppressive; second, when, although the plaintiff has succeeded in his action, the proceeding has been wrongful and oppressive.

SAME.—If attachment proceedings are wrongful and oppressive, that gives the defendant a right of action, whether the plaintiff has a good cause for his main action, or not, or whatever may be the result of the principal action.

From the Kosciusko Common Pleas.

Jameson & Calkins, J. W. Gordon, T. M. Browne, R. N. Lamb, and J. N. Kimball, for appellants.

A. G. Porter, B. Harrison, and C. C. Hines, for appellee.

DOWNEY, C. J.—This was an action by the appellee against the appellants founded upon an undertaking executed by them for an attachment in a suit brought by Harper against the

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appellee. There was judgment in this case in favor of the appellee, from which this appeal was taken. The errors assigned here are the overruling of the demurrer of the defendants to the complaint, sustaining the demurrer of the plaintiff to the second paragraph of the answer, overruling the defendants' motion for a new trial, and rendering judgment on the verdict of the jury when the complaint does not state facts sufficient to constitute a cause of action. The evidence is not in the record. The last assignment of error involves no question not presented by the first. It is, therefore, only necessary for us to decide the questions as to the sufficiency of the complaint, and as to the sufficiency of the second paragraph of the answer.

The complaint states, in substance, that the plaintiff was engaged, in December, 1870, in Fulton county, in the business of selling dry goods and groceries, was gradually becoming acquainted with the people, and building up a business, with a stock in hand of eight thousand dollars; that Harper held two notes against him, and in December, 1870, sued him on one of them; that believing he had a good defence to part of the amount, he employed counsel and prepared for his defence; that the cause was not reached in time for trial at that term of the court, the January term, 1871. It is further stated that previous to the March term, 1871, the other note matured, and Harper instituted legal proceedings on it against the plaintiff for the collection thereof, and on the 1st day of March, 1871, maliciously and fraudulently intending and contriving to injure and oppress the plaintiff, and to interrupt him in the prosecution of his business, without any just or legal cause, applied for and obtained an attachment against the goods, etc., of the plaintiff, filing therefor an affidavit, in which he stated that the defendant therein had sold, conveyed, and otherwise disposed of his property subject to execution, with intent to delay and hinder, cheat and defraud his creditors, and that he was about to sell, convey, and otherwise dispose of his property subject to execution, with such intent (the affi-

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davit being set out in full in the complaint) ; that to obtain said attachment, the defendant executed the undertaking on which this suit is predicated, which is also set out in full in the complaint. The writ or order of attachment is also set out in full.

It is further alleged that the sheriff by authority of the order or writ of attachment, under the direction of Harper, seized the entire stock of goods of the plaintiff, closed up the store, and stopped his business ; and the return of the sheriff is also set out in the complaint. The affidavit stated the amount which the plaintiff in the action ought to recover at seventeen hundred dollars. The amount in the order of attachment was stated at nineteen hundred dollars, and it is alleged that the goods seized were worth seven thousand dollars ; that the attaching of the entire stock of goods threw the plaintiff in this action out of business and deprived him of the means of support for himself and family ; that the allegations in the affidavit of Harper, for the attachment, respecting the plaintiff's having disposed of, or being about to dispose of, his property with intent to cheat, hinder, delay, and defraud his creditors, are false and without the slightest foundation in fact, and were fraudulently and maliciously made by the said Harper with intent to injure and oppress the plaintiff ; and the plaintiff says that the said suit in attachment has been determined in his favor, and that said Harper has wholly failed to prosecute said suit to effect, and has wholly failed to pay the damages sustained by the plaintiff herein, by reason of said attachment proceedings ; that the proceedings in attachment were and are without just cause, wrongful and oppressive, malicious and fraudulent ; that by reason thereof the plaintiff's business has been broken up and his credit in the community damaged, etc., and that he has been compelled to make a large sacrifice on his goods, to prevent them from being damaged and depreciated in value by being kept a long time in the hands of the sheriff, in consequence of his inability to give security for the purpose of releasing the same, and the

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necessity of selling the same while in the hands of the sheriff for the best price which he could realize therefor, and which was at least twenty-five hundred dollars less than they were worth; wherefore, etc.

The objection urged to the complaint is, that it does not sufficiently set forth the facts of the attachment case; that the record of the attachment suit with the issues therein joined upon the affidavit should have been set forth. It is urged that it is too late to raise a question of the groundlessness of the attachment in an action on the attachment bond, where there is no averment in the complaint that the question was raised in the attachment suit itself; that the main fact, that the original action was settled and determined in favor of the defendant therein, is not enough to authorize an inference that the attachment was wrongful and oppressive; that the attachment was but an incident of the complaint and must fall with it, and even where it fell with the main action may not have been wrongful and oppressive.

The statute provides, that the plaintiff obtaining an attachment, or some one in his behalf, shall execute a written undertaking, with sufficient surety, to be approved by the clerk, payable to the defendant, to the effect that the plaintiff will duly prosecute his proceeding in attachment, and will pay all damages which may be sustained by the defendant, if the proceedings of the plaintiff shall be wrongful and oppressive. 2 G. & H. 140, sec. 160.

The undertaking on which this action is founded was executed in conformity to this statute, and, after the title of the court and names of the parties to the action, is as follows: "We bind ourselves to the defendant, Oliver A. Keys, that the plaintiff, William H. Harper, shall duly prosecute his proceeding in attachment in the above entitled cause, and will pay to said defendant all damages which he may sustain if said proceedings shall be wrongful and oppressive." Signed by the defendants.

The statute which authorizes the action upon the undertaking reads thus: "Every defendant shall be entitled to an

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action on the written undertaking of the plaintiff or creditor, by whose proceedings in attachment he shall have been aggrieved, if it shall appear that the proceedings were wrongful and oppressive, and he shall recover damages at the discretion of the jury."

It will be seen that this statute does not require, in order to give the defendant in the attachment proceeding an action on the undertaking, that there should have been an issue made on the affidavit and a finding in the attachment proceeding in favor of the defendant therein.

It appears to us that there may be two results in the action, without any issue upon the affidavit, either of which would entitle the defendant to his action on the undertaking; first, when the plaintiff fails in his action, and the proceedings in attachment were wrongful and oppressive; and, second, where, although the plaintiff succeed in his action, the proceedings in attachment have been wrongful and oppressive. It is evident that the plaintiff may have a cause of action against the defendant, and yet have no sufficient and justifiable grounds on which to sue out an attachment and seize his property. If he have no cause of action, that fact, in connection with the fact that the attachment proceeding was wrongful and oppressive, if not of itself, would certainly give the defendant a right of action. In other words, if the attachment proceedings are wrongful and oppressive, that gives the defendant a right of action, whether the plaintiff has a good cause for his main action or not, or whatever may be the result of the principal action. But in this case it is alleged that the attachment proceeding was wrongful and oppressive, that the suit in attachment had been determined in favor of the plaintiff herein, and the facts showing his damage from the attachment proceeding are specially stated. We think there is no valid objection to the complaint.

The second paragraph of the answer, to which the demurrer was sustained, and the sustaining of which is the second error assigned, alleges that, in the suit of Harper

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against Keys, referred to in the complaint, and in which suit the attachment proceedings described in the complaint were instituted, no issue was made as to the truth of the facts alleged in the affidavit filed by Harper, as the ground of the attachment and as the cause of the issuing of the writ therein, and that no judgment was rendered or finding made in favor of said Keys in said attachment proceedings.

If we are correct in what we have decided upon the consideration of the question as to the sufficiency of the complaint, the court committed no error in sustaining the demurrer to this paragraph of the answer.

The judgment is affirmed, with five per cent. damages and costs.

 SPRAY v. RODMAN ET AL.

SUBROGATION.—Several persons were owners of undivided interests in certain land, and judgments were rendered which were liens upon the interests of some of such owners. A proceeding for partition of the land was instituted, and while it was pending the judgment debtors sold their interests, and their vendee was substituted for them as a party to such partition proceeding. The land, not being divisible, was sold, and the purchaser paid the commissioner the full value of the land, without any knowledge of said judgment liens, which judgments he was afterward compelled to pay to protect his title.

Held, that the land having been converted into money, the rights of the parties to the money should be the same as they were in the land, and that the purchaser who had paid off the judgments was entitled to be subrogated to the rights in such money of the distributee thereof who should have paid such judgments, and to receive from such commissioner out of such distributee's share the amount paid to satisfy said judgments.

SAYE—Where one pays a debt which could not properly be called his own, but which it was his interest to pay, or which he might have been compelled to pay for another, the law subrogates him to all the rights of the creditor.

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43	225
137	74
43	225
139	345
43	225
152	561

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SAME.—It is only in cases where the person paying a debt stands in the situation of a surety, or is compelled to pay in order to protect his own interests, or in virtue of legal process, that equity substitutes him in the place of the creditor, as a matter of course, without any special agreement.

From the Jackson Common Pleas.

W. K. Marshall, for appellant.

B. H. Burrell, for appellees.

DOWNEY, C. J.—The appellant sued the appellees, and there was judgment against him, on demurrer to his complaint. He excepted to the sustaining of the demurrer and the rendition of judgment, and having appealed to this court, has assigned the ruling as error. The facts stated in the complaint are, in substance, as follows: That there was then a suit pending in the said court, wherein Aden E. Rodman, Randolph M. Banks, and Jesse Banks, by his next friend, Nancy Banks, were plaintiffs, and Jennetta J. Summer, Malinda Banks, Josephine Banks, Adaline Lanier, James M. Lanier, Beedy Abigail Lanier, Andrew J. Banks, Althea Banks, and Margaret A. Martin were defendants, for the partition of certain real estate described in the complaint, and situated in Jackson county; that said Randolph M. Banks and John Banks were each the owners of one undivided eighth in value thereof, and while said suit was pending sold and conveyed the same to said Aden E. Rodman, who thereupon made himself a co-plaintiff with said other plaintiffs, and by virtue of his said purchase and the conveyance to him became the owner of said undivided interest in said lands, namely, the one-fourth part thereof; that in said proceeding for partition, the court found that said land could not be divided without injury to the parties, and appointed a commissioner to sell the same; that the commissioner sold the said real estate to the plaintiff, at the price of twenty-six hundred dollars; that at and before the commencement of said suit for partition of said land, William H. Ewing obtained a judgment against said Randolph M. Banks, in the court of common pleas of said county, for eighty-eight

dollars and fifty-three cents, and David H. Long, and John R. Hamilton, as administrators of the estate of Samuel P. Mooney, deceased, obtained a judgment in said court against John Banks for one hundred and forty-four dollars and sixty-two cents; that said judgments were valid liens on said interests of said Randolph M. Banks and John Banks in said land, while they owned the same and after they sold the same to said Rodman; that said Randolph M. and John Banks were insolvent at the time of said sale, and ever since have been; that said Spray, the plaintiff, had no knowledge whatever of the existence of said liens at the time he purchased said land, but purchased under the belief that the land was free from incumbrance; that the purchase-money which said plaintiff was to pay for said land had all been paid and was then in the hands of said commissioner, and was about to be distributed under the order of the court to the parties to this suit; that on the 22d day of August, 1871, the said judgments being in full force, unpaid, and valid liens upon said real estate, the plaintiff was compelled to and did pay the same off in full, in all two hundred and eighty-two dollars and thirty-nine cents, to protect his interest in and title to said real estate, the said sum being the amount of said judgments at the time of the payment thereof; that the share of said Aden E. Rodman as the grantee of said Randolph M. and John Banks in said purchase-money will be over five hundred dollars; and he avers that he is entitled to receive said sum of two hundred and eighty-two dollars and thirty-nine cents, and interest thereon since the said 22d day of August, 1870, out of the interest of said Randolph M. and John Banks and Aden E. Rodman in the proceeds of the sale of said real estate.

Prayer, that the plaintiff be subrogated to the rights of the defendants in said proceeds to the extent of said sum and the interest thereon since payment, and to the rights of said Hamilton and Long, administrators, and said William H. Ewing, and for other relief.

The demurrer to the complaint was on the ground that

Spray v. Rodman et al.

the complaint did not state facts sufficient to constitute a cause of action.

The doctrine of subrogation is probably derived from the civil law, and in a case where it is properly applicable is eminently just and proper. In a general sense it is the act of putting, by a transfer, a person in the place of another, or a thing in the place of another thing. It is the substitution of a new for an old creditor and the succession to his rights, *transfusio unius creditoris in alium*. In a more confined sense, and the sense in which it is applicable to the present case, it is where a man pays a debt which could not properly be called his own, but which nevertheless it was his interest to pay, or which he might have been compelled to pay for another, in which case the law subrogates him in all the rights of the creditor. Bouv. Law Dict., Tit. Subrogation. Accordingly, it was decided by this court, in *Richmond v. Marston*, 15 Ind. 134, that it was only in cases where the person paying the debt stands in the situation of a surety, or is compelled to pay in order to protect his own interests, or in virtue of legal process, that equity substitutes him in the place of the creditor, as a matter of course, without any special agreement. See, also, *Peet v. Beers*, 4 Ind. 46, and *Rardin v. Walpole*, 38 Ind. 146.

In the case under consideration, the judgments were liens upon the real estate so far as it was owned by Randolph M. and John Banks, and the judgment creditors might have enforced the liens and made the amounts of their judgments out of the land. While matters were in this shape, the petition for partition was filed, and a division of the land was sought, Randolph M. and John Banks being made parties to the action. While this suit was pending, Randolph M. and John sold and conveyed their shares of the land to Rodman, and he took their place in the partition suit, the judgments still remaining liens on the land, notwithstanding the conveyance thereof to him. The land, not being susceptible of division, was sold, by order of the court, the appellant, becoming the purchaser thereof, converted into money,

and the money was in the hands of the commissioner who had been appointed to sell the land. The land having been converted into money, we suppose the rights of the parties in the money should be the same that they were in the land. We understand from the complaint that the appellant paid the full value of the land, not having any actual knowledge of the existence of the judgment liens. He paid off the judgments, in order to prevent them from being made out of the land which he had bought, and for which he had paid. What Rodman purchased, and what was conveyed to him, was the interest of Randolph M. and John Banks in the land, subject to the two judgments. Had he continued to hold the two shares in the land, he must have paid off these judgments. Had he not paid them, they would have been collected and made out of the shares of the land so conveyed to him. Should the fact that the land was sold and converted into money make any change in his rights? We think there is no justice in his claim that it should. The debts for which the judgments were rendered were essentially the debts of Rodman after he purchased the shares of the land and received the conveyances therefor. Not that they were personally binding upon him, but they were his debts because he had acquired the ownership of the shares *cum onere*. After Spray purchased the land, including the shares of Rodman, his land stood as security for the payment of the debt of Rodman, and having paid the debt to relieve his lands, we do not see any reason why, in equity and justice, he should not stand in the place of the lien holders, and to that extent share in the proceeds of the sale of the land. If he cannot do this, Rodman escapes the payment of the debts—gets what he never bought and was never entitled to, the full shares of the land acquired from Randolph M. and John, without any abatement on account of the liens which were upon them, and which, as we have said, he or his shares were bound to pay. If he shall get, of the proceeds of the land, the price of the shares which he purchased, less the amount of the judgments, he will get all

 Sidener, Sheriff, *et al.* v. Bible.

that he purchased, and all that he ought to claim. The court should have overruled the demurrer.

The judgment is reversed, with costs, and the cause remanded, with instructions to overrule the demurrer.

48	280
133	472
43	230
144	341

 SIDENER, SHERIFF, ET AL. v. BIBLE.

VENDOR AND PURCHASER.—Incumbrance.—Indemnity.—Chattel Mortgage.—

A vendee of encumbered land, for which he paid full price, took from his vendor a mortgage on chattels to indemnify against such incumbrance. The mortgage was in the form prescribed by statute for a mortgage of real estate, and contained this clause: "The above property vests in mortgagee when mortgagor attempts defraud." The mortgagor resided in Tippecanoe county, and the chattels were in Montgomery county, and the mortgage was recorded in Montgomery county. The mortgagor attempted to defraud the mortgagee, and he learning the fact, although the incumbrance on the land was not due, and as to it there was no default, seized and took possession of the mortgaged chattels. After he had so come into possession, a third party recovered a judgment against the mortgagor, and an execution was issued, and by direction of the mortgagor the sheriff levied upon the mortgaged chattels in the possession of the mortgagee. The incumbrance indemnified against was still not due, and as to it there was no default when the execution was levied;

Held, that the chattel mortgage, in the form prescribed by statute for a mortgage of real estate, was a valid mortgage and sufficient in respect to its form to vest in the mortgagee an interest in the property according to the apparent intent of the parties.

Held, also, that by the language, "the above property vests in mortgagee when mortgagor attempts defraud," it was intended that the mortgagee should have the right to the possession of the property in the event that the mortgagor attempted to defraud him by some act having a tendency to defeat the mortgage security.

Held, also, that the failure to record the mortgage in the county in which the mortgagor resided rendered such mortgage void as to all persons other than the parties thereto, whether such persons had or had not acquired a lien upon the property.

Sidener, Sheriff, *et al.* v. Bible.

Held, also, that the execution plaintiff not having been a party to the mortgage, it was void as to him, and the mortgaged property was subject to his execution.

Held, also, that the incumbrance on the land not being due when the mortgagee took possession or when the execution was levied, he had not become the absolute owner of the property; and as he had no claim except by virtue of the mortgage, if that was invalid for want of legal registration, he had no legal or valid claim to the property as against creditors of the mortgagor.

CHATTEL MORTGAGE.—*Equity of Redemption*.—The question whether the mortgagor of chattels, after forfeiture, has an equity of redemption or not, was discussed, but not decided.

From the Montgomery Common Pleas.

R. C. Gregory, for appellants.

J. M. Cowan and *T. Patterson*, for appellee.

DOWNEY, C. J.—This action was brought by the appellee against the appellants, to recover certain personal property. There was a demurrer to the complaint, on the ground that the same did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and the defendant excepted. Final judgment was rendered for the plaintiff. The ruling of the court on the demurrer to the complaint is the error assigned.

William H. Allen purchased of Alexander P. Bible a certain tract of land in Tippecanoe county, for which he gave to Bible his promissory note, secured by mortgage upon the land, for the sum of seven hundred dollars, due March 1st, 1873. Afterward, William M. Bible, the appellee, purchased this tract of land from said Allen, paying him the full price, and took from Allen a chattel mortgage on the property in question to indemnify him in the event that Allen failed to pay the mortgage on the land. So much of this mortgage as it is material to notice is as follows:

“This indenture witnesseth, that William H. Allen, of Tippecanoe county, in the State of Indiana, mortgages and warrants to Richard M. Bible, of Montgomery county, in the State of Indiana, the following chattel property in Montgomery county, in the State of Indiana: Three bay

Sidener, Sheriff, *et al.* v. Bible.

mares, two five and one nine years old; two bay horses, one twelve and one eight years old; one brown mare, seven years old; two mules, one bay, one iron gray, four years old; two double corn plows, Pierce's make, Attica; six string plows; made at the Lafayette plow works. *The above property vests in mortgagee when mortgagor attempts defraud:* Also, a lease," etc. The mortgage is dated September 21st, 1871, was acknowledged before and certified by a justice of the peace of Montgomery county, on the same day, and recorded in the office of the recorder of that county on the 29th day of September, 1871. It is conceded that the mortgage was not recorded according to the statute on the subject of recording chattel mortgages, as the residence of the mortgagor was in Tippecanoe county, and the mortgage was recorded in Montgomery county.

It is alleged in the complaint, that on or about the first day of November, 1871, and for a long time previous thereto, and at divers times subsequent thereto, the mortgagor, William H. Allen, had attempted to defraud the plaintiff, by disposing of his property subject to execution and by attempting to dispose of the mortgaged property, without the knowledge of the plaintiff, and by making preparations secretly to leave the State, and to take with him the mortgaged property, intending to permit the land purchased as aforesaid to be sold to pay the said indebtedness for the purchase-money, and to defraud the plaintiff of the indemnity secured to him by the said chattel mortgage. It is also alleged that the plaintiff, learning said facts, did, on the 10th day of November, 1871, as he might well do by the terms of said mortgage, seize and take into his possession and from the possession of said Allen the personal property described in the mortgage, and that on the 5th day of December, 1871, the defendant, Sidener, sheriff, etc., under the direction of Allen, levied upon and took into his possession the said mortgaged property, by virtue of an execution then held by him in favor of George H.

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Allen against the said William H. Allen. A certified copy of the execution and the judgment on which the same was issued is filed and made part of the complaint, by which it appears that the judgment was rendered and the execution issued subsequent to the time when the plaintiff took possession of the mortgaged property. The facts were set out thus fully in the complaint, that the questions of law involved might be presented on demurrer thereto.

The parties adopted in this case the form prescribed by statute for a mortgage of real estate. 1 G. & H. 260, sec. 15. That form is not by statute made applicable to mortgages of chattels. Still, we think we must regard it as a valid mortgage of the chattels in question, so far as its form is concerned. It is sufficient in respect to its form to vest in the mortgagee an interest in the property according to the apparent intent of the parties. There is some uncertainty as to the meaning to be attached to the clause in italics, by which the property was to vest in the mortgagee when the mortgagor attempted to defraud. But looking at the whole instrument and the attending circumstances, we come to the conclusion that by this clause it was intended that the mortgagee should have the right to the possession of the property in the event that the mortgagor attempted to defraud him by some act having a tendency to defeat the mortgage security. We cannot think that the parties used the word "vest" in its technical sense—the sense in which it means the right merely to the enjoyment of the property present or future. The right vested by the execution of the instrument, so far as it is a security for the payment of the debt in question. The parties evidently intended that the possession of the property should remain with the mortgagor until the happening of the contingency mentioned, or until default in the payment of the debt.

We hold that the allegations in the complaint with reference to the attempt of the mortgagor to defraud the

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mortgagee are sufficient to justify the mortgagee in taking possession of the mortgaged property.

The mortgage was not legally recorded, as may be seen by referring to the statute on the subject, which provides, that "no assignment of goods by way of mortgage shall be valid against any other person than the parties thereto, where such goods are not delivered to the mortgagee or assignee and retained by him, unless such assignment or mortgage shall be acknowledged, as provided in case of deeds of conveyance, and recorded in the recorder's office of the county where the mortgagor resides within ten days after the execution thereof."

The effect of failing to record the mortgage as required by the statute quoted was to render the mortgage invalid against any other person than the parties thereto. The execution plaintiff, George W. Allen, was not a party to the mortgage, and consequently the mortgage was void as to him. But it is insisted by the appellee that the fact that the mortgage was not recorded as required by the statute is immaterial, inasmuch as the mortgagee got possession of the property in consequence of the attempt to defraud before the rendition of the judgment and the issuing of the execution, levy, etc., of the appellant George W. Allen.

It is claimed that the mere existence of creditors, if they have acquired no lien upon the property, does not prevent the owner from making a *bona fide* conveyance of it, and that the mortgage in this case being valid between the parties, and the mortgagee having obtained possession of the mortgaged property under the mortgage, before appellant acquired any lien thereon, it can make no difference whether the mortgage was ever recorded or not.

The statute requiring mortgages of chattels to be recorded within a fixed time, in the county of the residence of the mortgagor, does not apply to controversies relating to the priority of liens merely. The statute renders the mortgage void, when not properly recorded, as to all persons other than the parties thereto, whether such persons have or have

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not acquired a lien upon the property. Such is plainly the language and meaning of the statute.

It has been made a question whether the mortgagor of chattels after forfeiture has any equity of redemption or not. In this State it seems to have been held that the mortgagee of chattels may maintain an action to foreclose the equity of redemption of the mortgagor. *Woodward v. Wilcox*, 27 Ind. 207; *Trittipo v. Edwards*, 35 Ind. 467. If there is an equity of redemption which may be foreclosed, it would seem to follow that there is an equity of redemption, by virtue of which the mortgagor may redeem. But this question is not so presented here as to make it necessary for us to decide it. The mortgage debt in this case was not due, when the mortgagee took possession of the mortgaged property, nor when the execution was levied upon the property. It cannot be held that the mortgagee had become the absolute owner of the mortgaged property, even supposing that there is no such thing as an equity of redemption in the mortgagor after forfeiture. The mortgagee was in possession of the property in consequence of the violation of the stipulation in the mortgage entitling him to such possession upon any attempt to defraud him by the mortgagor, and not in consequence of the maturing of the debt and a failure to pay it. At most, supposing the mortgage to have been in all respects valid, he had no right to claim the property as his absolutely. He held it only as he would have held it if the mortgage had entitled him to the possession and the same had been delivered to him at the time of the execution of the mortgage, awaiting the maturity of the mortgage debt, when he would have been vested with the ownership or entitled to foreclose the mortgage in some mode known to the law. When the sheriff levied upon the property and the appellee set up his claim to it, he could claim by the force of the mortgage only. He had no other claim to it than by virtue of the mortgage. If that was invalid for want of legal registration, then the appellee had no legal and valid claim to the property. That the mortgage was

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invalid as to creditors from and after the expiration of the ten days from the date of its execution we have no doubt. If the mortgage is not recorded as required, then, to make the mortgage valid, as against any other person than the parties to it, the property must be delivered by the mortgagor or assignor to the mortgagee or assignee at the time of the execution of the mortgage, and it must be retained by him.

If we are right in this position, then the question as to the right of a sheriff to take possession of mortgaged chattels, for the purpose of selling the equity of redemption, does not arise, for there would be no valid mortgage, no equity of redemption, so far as creditors are concerned, and consequently a perfect right in the sheriff to take possession of the property and sell it in this as in any case where there was no incumbrance on the property.

The judgment is reversed, with costs; and the cause is remanded, with instructions to overrule the demurrer to the complaint, and for further proceedings.



**THE MUD CREEK DRAINING COMPANY v. THE STATE, EX REL.
MARLEY ET AL.**

CORPORATION.—Information.—An information against a corporation in its corporate name charging that it has not been legally organized, and pointing out certain supposed defects in its organization, and praying for the dissolution of its franchises, is bad for not being against certain persons claiming to be a corporation. It cannot be brought into court as a corporation to answer an allegation that it is not and never was a corporation. When a corporation is brought into court by its corporate name, its existence as such is admitted.

From the Miami Common Pleas.

J. M. Brown, N. O. Ross, and R. P. Effinger, for appellant.
A. J. Davidson and J. R. Parmlee, for appellees.

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PETTIT, J.—This was an information brought by the appellees against the appellant, under the third and fourth subdivisions of section 749 of the code, 2 G. & H. 322-3, which read as follows: "Where any association or number of persons shall act within this State as a corporation, without being legally incorporated, or where any corporation do or omit acts which amount to a surrender or forfeiture of their rights and privileges as a corporation, or when they exercise powers not conferred by law." It is clear that these provisions relate, first, to persons who claim to exercise, or are exercising powers of a corporation without being legally incorporated; and, second, to corporations legally organized, that have done or omitted to do some act by which their corporate rights are forfeited.

The information in this case was in two paragraphs. The first charged that the corporation had not been legally organized, pointing out certain supposed defects in its organization; and the second charged a forfeiture of the corporate franchises for doing and omitting to do certain things, which it is claimed the corporation was bound to do or leave undone, to prevent a forfeiture of their corporate existence. Prayer for dissolution, and, investing the corporate franchises in the State, etc. There was a demurrer to the information, or complaint, in these words: "Said defendant demurs to the first and second paragraphs of plaintiffs' complaint, for the cause that neither of said paragraphs contains facts sufficient to constitute a cause of action." This demurrer was overruled, exception taken, and this ruling is assigned for error. The first paragraph was clearly bad. It is not against certain persons claiming to be a corporation, but against the corporation by its corporate name. It is brought into court as a corporation, to answer an allegation that it is not and never was a corporation. When a corporation is brought into court by its corporate name, its existence is thereby admitted. *The People v. The Rensselaer and Saratoga Railroad Company*, 2 American Railway Cases, 433, 445, and reported in 15 Wendell, 113. Chief Justice SAVAGE, in the

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delivery of the opinion in that case, says: "If, therefore, the information in this case had for its object to oust the defendants from acting as a corporation, and to test the fact of their incorporation, it should have been against individuals; if the object was to effect the dissolution of a corporation which had an actual existence, or to oust such corporation of some franchise which it unlawfully exercised, then the information is correctly filed against the corporation." And the reason assigned is, that judgment of ouster is rendered against individuals for unlawfully assuming to be a corporation. And, while it is rendered against corporations for exercising a franchise not authorized by their charter, in such case, the corporation is ousted of such franchise, but not of being a corporation. And the Chief Justice continues: "When, therefore, an information is filed under the revised statutes against a corporation by its corporate name, the existence of the corporation is admitted; or rather, that it once had a legal existence."

In Angell & Ames Corporations, sec. 756, the following language is used: "If the affidavit of the relator charge the defendant as 'an incorporated bank,' and the information and subpoena are against the corporation, and the subsequent pleadings conform in this respect to the affidavit and process, it is too late to question the existence of the corporation, upon the ground of its non-performance of conditions precedent to its corporate existence, the State waiving the performance of such conditions through these acts and admissions of its own officers, or being estopped from asserting their non-performance. If such conditions are to be insisted on, the proceedings should be against the usurping individuals, and should not treat them as a corporation; since this last course would be to charge them in one character, and to proceed against them in another. In a proceeding against a corporation the question is one of forfeiture, not of existence."

We hold that the first paragraph of the complaint, or information, was bad, and that the demurrer to it was improperly

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overruled, because it charges a corporation in its corporate name with not being legally organized, and does not charge that certain persons claim to be and are exercising the rights of a corporation, without having a legal existence as such corporation. *State, ex rel., etc., v. Cincinnati Gas Light and Coke Company*, 18 Ohio St. 262.

The second paragraph of the information charges that for irregularities in doing and not doing certain acts, required by the statute, the corporation has forfeited its franchise and should be dissolved. Without deciding whether these two causes of action, one for not being incorporated, and the other for forfeiture of franchises, could be united, or whether, as the plaintiff could not maintain her action on the first paragraph, she may or can maintain it on the second, we hold that irregularity in doing or not doing (so far as complained of in this case) what is provided for in the act under which this corporation was formed, Acts 1869, p. 82, is cured and saved from being a cause of forfeiture by sec. 15 of the same act, a part of which reads as follows: "No informality, irregularity, or omission, which shall have occurred, or which may occur in the organization or proceedings of any company, or in the appointment or proceedings of any of their officers, agents, or the appraisers, shall affect the rights and privileges of such company, or invalidate the assessments of the appraisers." We have copied as much of the above section as applies to the objections raised in the information, there being no question raised as to the foreclosure or sale of land by virtue of the lien created by the assessments. The court below erred in overruling the demurrer to the second paragraph of the information.

The judgment is reversed, at the costs of the relators, with instructions to the court below to sustain the demurrer to the whole information or complaint.

Baker v. Farmbrough et al.

BAKER v. FARMBROUGH ET AL.

STATUTE OF FRAUDS.—*Earnest*.—In a contract for the sale of goods of the value of fifty dollars or more, where the purchaser pays a sum of money as earnest or part payment, such payment takes the sale out of the operation of the statute of frauds, and the contract may be proved by parol.

ARBITRATION.—*Award*.—Where in a common law arbitration the submission is to three, and there is no agreement that two may act and render an award, all three of the arbitrators must meet, hear the proofs, and sign the award, to render such award valid.

EVIDENCE.—*Conflict*.—Where there is a direct and irreconcilable conflict in the evidence, this court will not upon the evidence disturb the verdict of the jury.

From the Dearborn Common Pleas.

J. Schwartz, for appellant.

Major & Major, for appellees.

BUSKIRK, J.—This was an action by the appellees against the appellant, to recover damages for the breach of a contract for the sale of hogs.

The substantial allegations of the complaint are these: That the plaintiffs were, on the —— day of April, 1869, the owners of one hundred and seventy-one hogs, which were upon the farm of Farmbrough in Shelby county, Indiana; that such hogs had been previously weighed at Morgantown, and weighed, in gross weight, twenty-one thousand nine hundred and sixty-six pounds; that the plaintiffs on said day sold such hogs at said weight to the appellant, at six cents per pound, and the expense of driving them from Morgantown to the said farm, which amounted to the sum of twenty-six dollars and fifteen cents; that at the time of the said purchase, the defendant paid thereon the sum of one hundred dollars, and promised to pay the balance in about eight days; that it was further agreed that until such payment was made the said hogs should remain on the said farm and be fed and taken care of by the plaintiffs, for which they should receive a reasonable compensation; that in about two days after the said sale, the said hogs were attacked with cholera, and that the defendant employed

some one to cure the hogs of said disease, and that the plaintiffs at the request of the defendant continued to feed and take care of them; that the defendant left the said hogs at the said farm until the 15th of August, 1867; that forty-two of said hogs died of said disease; that the defendant, although often requested so to do refused to take said hogs and pay the balance due thereon; that on the day last aforesaid, the plaintiffs sold the residue of said hogs for one thousand and fifty-four dollars and fifty-five cents, being much less than the price for which they had been sold to the defendant; and that the plaintiffs were reasonably entitled to recover for feeding and taking care of said hogs the sum of four hundred and eighty dollars.

This suit was brought to recover the difference between the price for which the hogs were sold to the defendant and that at which they were afterward sold by the plaintiffs, and compensation for feeding and taking care of such hogs.

The defendant filed an answer consisting of three paragraphs. The first was in denial.

The second paragraph of the answer, by way of set-off or counter-claim, set up another contract concerning the sale of said hogs, and claimed a reimbursement of the one hundred dollars paid on such contract, and also damages for the failure of the plaintiffs to comply therewith; and it was averred that such contract was partly reduced to writing, but that by the mutual mistake and inadvertence of the parties, the name of the defendant was not inserted therein, and that other stipulations in reference to the weighing and place of delivering of said hogs were omitted.

There was a prayer for a reformation of said contract, so as to make it express the true intent and meaning of the parties, and a judgment for damages was demanded. The writing referred to was written in a blank book of the defendant's and was as follows;

"Bought of Farmbrough and Watts one hundred and seventy-one stock hogs; that they were here on Farmbrough's farm;

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to make said hogs net them six dollars per hundred, at Morgantown. Also one hundred as good as the one hundred and seventy-one, to be delivered at Morgantown at six dollars per hundred. Rec'd on the above one hundred dollars. One hundred and seventy-one hogs to be delivered on cars.

“ B. FARMBROUGH,
“ M. WATTS.”

The appellant asked to have the above memorandum amended by inserting his name therein, and by showing the one hundred and seventy-one lot of hogs were to be weighed on the scales of Daniel Bradly and delivered on the cars at Fairland, and that the lot of one hundred hogs was to be weighed at Morgantown and delivered on the cars at Fairland.

The third paragraph of the answer sets up the same matters as the second, and in addition thereto alleges that on the 21st day of January, 1870, the parties agreed, in writing, to submit the said matters in controversy between them to the arbitrament of Henry C. Morgan, Lewin B. Lewis, and James Hays ; that afterward, upon notice to all of said arbitrators and the parties, the said Henry C. Morgan and Lewin B. Lewis met, but that the said James Hays failed to meet and act with them ; that the plaintiffs failed to appear before the said two arbitrators, but that the defendant appeared before them and submitted said matters in controversy ; and that said two arbitrators awarded to the defendant the sum of two hundred dollars in damages, a copy of which award was duly served upon the parties. A copy of the papers relating to the arbitration was filed with this paragraph of the answer.

The court sustained a demurrer to the third paragraph, and struck out of the second all that related to the written contract and the reformation thereof, to which proper exceptions were taken.

The cause was tried by a jury and resulted in a verdict in favor of the appellees for seven hundred and eighty-eight dollars and seventy-eight cents. The court, having overruled

a motion for a new trial, rendered judgment on the verdict.

The appellant has assigned for error the following:

1. The striking out of a portion of the second paragraph of the answer.

2. The sustaining of the demurrer to the third paragraph of the answer.

3. The overruling of the motion for a new trial.

Did the court err in striking out of the second paragraph of the answer so much thereof as sought a reformation of the memorandum of an agreement?

Counsel have discussed with much ability a question which in our opinion does not arise in the case, and that is, that the contract set up is within the statute of frauds; that the memorandum of agreement is so imperfect and defective, that it will not take it out of the operation of the statute; and that a contract which is required by the statute to be in writing, and which has been partly reduced to writing, cannot be reformed by parol proof showing the true meaning and intention of the parties.

It is provided by the 7th section of our statute of frauds, that "no contract for the sale of any goods, for the price of fifty dollars or more, shall be valid, unless the purchaser shall receive part of such property, or shall give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing of the bargain be made, and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized." 1 G. & H. 351.

By the above section, a sale of goods of the value of fifty dollars or more will be within the statute of frauds, unless one of three things is done. 1. Unless there shall be a delivery to the purchaser of a part of the goods sold; or, 2. Unless the purchaser shall give something in earnest to bind the bargain, or in part payment; or, 3. Unless there is a note or memorandum in writing signed by the party to be charged or by some person thereunto lawfully authorized. Either a part delivery of the goods, or part payment, or a

note or memorandum of the sale, will take it out of the operation of the statute.

It is expressly alleged in the second paragraph of the answer, that the appellant at the time of the making of the contract gave as earnest to bind the bargain or as part payment the sum of one hundred dollars. This took the sale out of the operation of the seventh section of the statute of frauds and rendered a reformation of such contract unnecessary. The note or memorandum made by the appellant was so imperfect and defective as to be void under the statute; the contract rested solely in parol and might have been proved by parol, and it appearing from the evidence in the record that the appellant and appellees did in fact fully testify in reference thereto, the appellant was not injured by the action of the court in striking out such portion of the answer. The court committed no error in sustaining the motion to strike out.

The question presented for our decision by the action of the court in sustaining a demurrer to the third paragraph of the answer is, whether, in a common law arbitration, where the submission is to three, and there is no agreement that two may act and render an award, two may meet and make a valid award.

It was held by this court in *The Jeffersonville Railroad Co. v. Mounts*, 7 Ind. 669, that in such a case, all three of the arbitrators must meet, hear the proof, and sign the award.

The case of *Kile v. Chapin*, 9 Ind. 150, is apparently, but not in reality, in conflict with the ruling in the above case. In that case the submission was to two, with an agreement in case they disagreed they were to select an umpire. The arbitrators disagreed and selected an umpire. The award was signed by the umpire and one of the arbitrators. The court, in speaking of the third person chosen, say: "He was an umpire, und not an arbitrator. His own signature to the award would have been sufficient. Had the umpire and one or both arbitrators signed the award, it would still have been the award of the umpire."

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The court, having decided the point involved in the case, proceeded to say: "Even when several arbitrators are appointed by the parties, and one refuses to act, the award of the other arbitrators will be valid. For the law will not put it in the power of one arbitrator to defeat the submission by withdrawing from the trust. *Maynard v. Frederick*, 7 Cush. 251; *Carpenter v. Wood*, 1 Met. 409; *Yates v. Russell*, 17 Johns. 461; *Haskell v. Whitney*, 12 Mass. 49."

The record in the above case did not call for any expression of opinion upon the question passed upon in the quotation made therefrom. The question, not being before the court, was not, we are bound to presume, much considered by the court, or that the learned and usually very accurate judge who delivered the opinion of the court, in the haste of writing, omitted to state the qualification contained in the cases cited, that the award of the majority would be valid when it was so agreed by the parties. We have carefully examined the four cases cited as supporting the principle of law therein enunciated, and find that none of them sustain such a doctrine. In the first three cases cited, the submission was made to three arbitrators, with an express agreement in the submission "that the award so made up by said referees, or by a majority of them, should be final and binding upon both parties." All of the arbitrators acted, but the award was signed by only two of them. The court, in each of the cases, held the award valid, but in express terms stated that it would have been invalid but for the agreement of the parties that it might be made by a majority of the arbitrators.

No such question was involved or passed upon in the case of *Haskell v. Whitney*, *supra*. The question not being before the court, and the doctrine announced being unsupported by the cases cited, the above quoted passage cannot be regarded as an adjudication, but must be treated as a mere *dictum*.

The law on the question under examination is stated with great accuracy and completeness by Morse, in his recent and very excellent work on Arbitration and Award. He says,

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on page 151; "It is an imperative rule that where the submission is to several arbitrators jointly, all must act together during the proceedings. All must be present throughout each and every meeting, equally whether the meeting be for hearing the evidence or arguments of the parties or for consultation or determination upon the award. The disputants are entitled to the exercise of the judgment and discretion, and to the benefit of the views, arguments, and influence, of each one of the persons whom they have chosen to judge between them; and they are entitled to these, not only in the award, but at every stage of the arbitration."

The same author, on page 159, says: "If the withdrawal or refusal to act occurs at the outset, before any hearing has been had or any attempt at agreement can have been made or can have failed, it might reasonably be said that the tribunal chosen by the parties has been so far changed that they can no longer be bound by its decision. Authorities for this rule can be found only where references have been made by rule of court to referees. Then, though a majority may make a valid report, yet if one of the number refuses altogether to share in the proceedings and withdraws and absents himself from the beginning, the rule is said to be thereby discharged."

The same author, on page 162, says:

"Unless the statute or the submission, under which the arbitrators act and derive their authority, provide to a contrary effect, or unless a contrary intention of the parties can be clearly and unmistakably gathered from the submission and attendant facts, the rule is general and imperative that all the arbitrators must unite in the award in order to render it valid. A different rule is allowed to prevail in matters of public concern. Where persons are charged with the performance of public duties, the decision of a majority is usually accepted. So it is with a bench of judges, where the concurrence of a majority constitutes the decision of the court. But a submission to arbitration is a 'delegation of power for a mere private purpose,' and the 'concur-

rence of all interested with the power is necessary to its due execution.' The rule is thoroughly established both in England and in the United States."

We are of the opinion that the court committed no error in sustaining the demurrer to the third paragraph of the complaint.

Did the court err in overruling the motion for a new trial? 'It is in the first place insisted that the damages assessed by the jury are excessive. The calculation of counsel for appellant is based solely upon the difference between the price for which the hogs were sold to the appellant, and that at which they were afterward sold by the appellees. This ignores any compensation to the appellees for feeding and taking care of the hogs between the two sales, under the contract set up in the complaint and which seems to have been sustained by the evidence.

It is in the next place claimed by counsel, that the verdict is not sustained by the evidence. The parties to the action were the principal witnesses, and there is a direct and irreconcilable conflict in the evidence. In such a case we cannot disturb the verdict.

The learned counsel who have briefed this case are usually very accurate, but in this case they have fallen into a habit that is becoming altogether too common with the profession, of referring to adjudged cases by the number and page of the volume, without giving the names of the parties. If there is a mistake made in the volume or page, we have no adequate means of finding the cases, but if the names of the parties are given we can usually find the cases, although there may be a mistake in the volume and page. Our labors would be greatly lightened and an examination of the cases relied upon secured, if counsel would, in citing authorities, give the names of the parties, the number of the volume and the page, and in referring to text books would give the edition and whether the reference is to the top or side paging.

The judgment is affirmed, with costs.

Mills *et al.* v. Malott *et al.*

MILLS ET AL. v. MALOTT ET AL.

43	248
124	425
43	218
143	208

CHATTEL MORTGAGE.—*Possession of Mortgaged Property.*—Sureties, who have paid the debt of their principal and who hold a mortgage upon a chattel to indemnify them, where the mortgage provides that if the debt is not paid at maturity by the mortgagor the sureties shall have possession of the mortgaged property, may recover possession thereof.

REPLEVIN.—*Part Owner of Chattel.*—One part owner of a chattel cannot maintain an action against the other part owner or part owners to recover possession thereof. One has as much right to the possession as the other or others.

SAME.—A defendant in an action to recover possession of a chattel, who is a part owner with the plaintiff, cannot in his answer claim and have judgment for the possession of the part owned by such defendant; nor is it proper in such action to render judgment for the value of such part if possession be not given by the plaintiff.

From the Grant Circuit Court.

G. T. B. Carr, N. W. Gordon, I. Van Devanter, J. F. McDowell, C. H. Test, and D. V. Burns, for appellants.

J. Brownlee, A. Steele, and R. T. St. John, for appellees.

DOWNEY, C. J.—This was an action for the recovery of personal property, consisting of a portable saw-mill, fixtures, and machinery thereto belonging, brought by the appellants against the appellees. It was alleged in the complaint that the plaintiffs were the owners of the property and entitled to its possession, and that the defendants had possession thereof without right, and unlawfully detained the same from the plaintiffs. Possession of the property was demanded and one hundred dollars damages for its detention.

The defendant Jones filed no answer, nor was any notice taken of him in the progress of the cause.

The defendant Malott answered: 1. The general denial. 2. That in 1869, one Willcuts was the owner of the mill, etc., and the plaintiffs held a mortgage thereon, executed by Willcuts to indemnify them against the payment of a debt of Willcuts, for the payment of which they were sureties for him to the Eagle Machine Works; that the plaintiffs had not been damnified; that he, the said Malott, is the

owner of an undivided one-half of said property by purchase from Willcuts; that Willcuts, confederating with the plaintiffs to cheat and defraud the defendant out of his interest in said mill, etc., fraudulently surrendered the same to the plaintiffs on their mortgage; wherefore, etc. 3. The third paragraph alleges the ownership of said property by Willcuts, the existence of the mortgage thereon, and avers that in this condition of affairs, the plaintiffs requested the defendant to purchase an undivided half of said property from Willcuts, which he declined to do on account of the existence of said mortgage of plaintiffs thereon; that, to induce him to make said purchase, the plaintiffs, by Job S. Mills, one of their number, agreed with the defendant, that if he would make such purchase from said Willcuts, they would, on the payment of the purchase-money therefor, release the said undivided half of said mill, etc., from the lien of said mortgage. Defendant avers that he accepted said offer, and purchased said undivided half of said mill, etc., from said Willcuts for the sum of one thousand seven hundred and fifty dollars, relying upon said promise; that he took possession of said one undivided half of said mill, etc., and held the same for a long time, and fully paid the said purchase-money to said Willcuts, and thereupon requested said plaintiffs to release said mortgage, which they failed and refused to do; and he avers that the plaintiffs wrongfully took possession of said mill, etc., and have wrongfully retained the same for one year. He demanded judgment for possession of the one-half of said mill, etc., and that the plaintiffs be required to release their said mortgage thereon.

The reply was a general traverse of the second and third paragraphs of the answer. A trial by jury resulted in this verdict: "We, the jury, find for the defendant, and that he is the owner and entitled to the possession of the one undivided one-half of the property mentioned in the complaint, and that the same is of the value of seven hundred and fifty dollars."

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A motion for a new trial was made, for the reasons that there was error in the assessment of the amount of the recovery, the same being too large. 2. That the verdict was not sustained by sufficient evidence. 3. It was contrary to law. 4. Error of law occurring on the trial of the cause, excepted to by the plaintiff at the time. 5. Error in giving instructions to the jury numbered three, four, five, and six.

This motion was overruled, and the plaintiffs excepted. They then moved in arrest of judgment, which motion was also overruled, and they again excepted.

The court rendered judgment that Malott recover of the plaintiffs the possession of the undivided one-half of the said property, and that in default of the delivery thereof by the plaintiffs, he recover of the plaintiffs said sum of seven hundred and fifty dollars, and that he also recover of the plaintiffs his costs and charges, etc.

The only errors properly assigned are the overruling of the motion for a new trial, and the rendering of judgment for the recovery of possession of the undivided half of the property in favor of the defendant.

Upon an examination of the evidence, which is all in the record, we are quite clearly of the opinion that it was not sufficient to justify the verdict of the jury. We think it was insufficient in two respects. 1. The mortgage which is in evidence entitled the plaintiffs to possession of the mill, etc., upon failure of Willcuts to pay the debt on which they were securities for him, when it became due. The debt was due and had been paid by the plaintiffs long before this action was brought. The plaintiffs were therefore entitled to possession of the property according to the mortgage. Malott alleged, however, in his answer, that the plaintiffs had agreed to release the mortgage on half the mill, if he would pay Willcuts the agreed price of that half. The evidence shows that the plaintiffs, Job S., Jonathan, and Owen Mills, were not partners, but had severally become the securities of Willcuts, and were severally indemnified under and by the mortgage. There is evidence both for and against the proposi-

tion that Job. S. Mills made the agreement to release the mortgage. But there is no evidence whatever that either Jonathan or Owen Mills ever made or assented to any such agreement. Job S. denies positively ever having made such agreement, but admits that he agreed to the release, if the notes on which he was security should be paid.

Again, we think the evidence, even as to Job. S. Mills, fails to show that he agreed to the release of the mortgage upon payment of the agreed price to Willcuts. It would seem to be improbable that it should have been agreed that the price of the half purchased by Malott should be paid to Willcuts, which would be no payment on the debt for which the plaintiffs were security for Willcuts to the Eagle Machine Works. Willcuts testified that Malott paid him nine hundred and six dollars and twenty-five cents for sawing, five hundred dollars paid to Ort. Phillips, two hundred dollars paid on little mill, twenty-five dollars to Clarkson Willcuts, twelve dollars or thirteen dollars for timber, forty dollars for a cow, and ten dollars to a hand. It is quite unreasonable to suppose that the plaintiffs ever agreed to release their mortgage on the mill for any such considerations as these and they paid to Willcuts, and not to them or to the party to whom they were sureties. Malott did not testify that it was agreed that he should pay for the half of the property bought by him to Willcuts.

We are of the opinion that the court should not have rendered the judgment which it did render on the answer of Malott. As an answer showing that he was a part owner of the property, it was a good defence to the plaintiffs' action, for it is well settled that one part owner cannot maintain an action against the other part owner or part owners of a chattel to recover possession thereof. One has as much right to the possession of the chattel as the other or others. If the plaintiffs and the defendant Malott were part owners of the mill, etc., and Malott had possession of it, the plaintiff could not maintain the action against him, and therefore his answer was good. But neither could Malott, if he was a

part owner with the plaintiffs of the property, maintain an action for, or in his answer claim and have judgment for, possession. Nor do we think it was proper to render judgment for the value of the one-half of the mill, etc., even had the evidence been sufficient, in the event that such half was not delivered by the plaintiffs to the defendant. Judge STORY says: "In general, the rights, duties, obligations, authorities, and liabilities of part owners are the same, in relation to every kind of personal property; and, therefore, whatever is affirmed in relation to one, will apply to all others, unless in cases where, from the peculiar nature and uses of a particular species of such property, or the peculiar customs and usages appertaining thereto, a different rule arises, by implication of law, to govern or affect it. Thus, for example, if two persons are tenants in common of a horse, or other personal chattel, each has an equal right to the possession and use thereof; and each can sell only his own undivided share thereof. If one tenant in common takes exclusive possession of a personal chattel, refusing to the other any possession or use thereof, the latter has no remedy whatsoever by action; but he may take the chattel, if he can find it, from him who hath done him the wrong," etc. Story Part., sec. 414. For the destruction of the property, and probably for a sale of the entire property by one without the consent of the other, an action would lie. Sec. 449. Courts of equity have, in some cases, exercised jurisdiction in suits between part owners, but not to compel the delivery of the property from one of them to another having no superior right to its possession. The rules of law relating to part ownership of personal property are more frequently discussed and applied in cases relating to ships than in relation to other kinds of personal property, and in such cases courts of admiralty exercise a jurisdiction in some cases. But the rules of law relating to such ownership are the same as stated by Judge STORY, "in relation to every kind of personal property."

We do not deem it necessary to enter upon the consideration of the other questions discussed by counsel.

The judgment is reversed, with costs; and the cause is remanded, with instructions to grant a new trial.

BROWN ET AL. v. FREED ET AL.

REAL ESTATE.—Action to Recover.—Insanity of Grantor.—In a suit for the recovery of real property, where the complaint was in the statutory form and the defendant pleaded the general denial, the plaintiffs proved that they were the legal heirs of a deceased former owner of the land, and the defendant claimed title under a deed made by the ancestor of the plaintiffs.

Held, that it was competent for the plaintiffs to introduce evidence to show that their ancestor was insane when he executed the deed.

SAME.—Title.—Quality of.—The title of the heirs in such case is legal, and not equitable; the deed of the insane ancestor, being void, conveys no title, and his heirs take the legal estate by descent.

From the Orange Circuit Court.

A. B. Carlton and *J. W. Tucker*, for appellants.

A. I. Simpson, for appellees.

BUSKIRK, J.—Suit by the appellants against the appellees to “recover real property.” The complaint avers that the plaintiffs “are the owners in fee simple and entitled to the possession” of the land in controversy; and that the defendants hold possession of the same without right.

The defendants answered by the statutory denial. Trial by jury and finding for defendant. The court, over appellants’ motion for a new trial, rendered judgment on the verdict.

The appellants have assigned for error the overruling of the motion for a new trial.

The first and principal reason assigned for a new trial was the exclusion of the testimony of John Lee and others, which was offered to prove the insanity of Jacob Nidiffer.

The question arose thus: The plaintiffs were the children

43	253
124	131
43	253
132	484
133	426

43	253
170	504

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and heirs at law of Jacob Nidiffer, deceased, from whom they claimed the land in dispute by descent.

The plaintiffs proved their heirship and the death of their father. They introduced a deed for the land in question, dated the 28th of August, 1839, from John Nidiffer and wife to Jacob Nidiffer. The plaintiffs then rested.

The defendants then read in evidence the following deeds for the land in controversy :

1. A deed from Jacob Nidiffer to Solomon Nidiffer, dated March 8th, 1853.

2. A deed from Solomon Nidiffer to Richard D. Walters, dated October, 3d, 1855.

3. A deed from Richard D. Walters to Josephine Freed.

And here the defendants rested.

The plaintiffs then introduced John Lee, and by him offered to prove that at the date of the deed from Jacob Nidiffer to Solomon Nidiffer, the said Jacob Nidiffer was insane. To the introduction of this evidence the defendants objected, upon the ground that the question of the sanity or insanity of the said Jacob Nidiffer did not arise and could not be tried, upon a complaint in the ordinary or statutory form for the recovery of real estate. The objection was sustained, and the evidence was excluded, to which ruling the appellants excepted.

The positions assumed by counsel for appellees are, that the plaintiffs in their complaint claimed to be the owners in fee and based their right of recovery upon the legal title ; that the legal title was shown to be in the defendants ; that a claim to recover the possession of real property cannot be sustained by proof of an equitable title ; and that where the legal title is vested in the defendant, the plaintiff can only recover upon an equitable title, by alleging in his complaint the facts showing the nature of his title ; and in support of these positions reference is made to the cases of *Stehman v. Crull*, 26 Ind. 436, and *Rowe v. Beckett*, 30 Ind. 154. The ruling in the first named case is reviewed in the last, and we shall therefore quote only from the case last cited.

The court, on pages 160, 61, say: "A defendant in an action for the recovery of real property, under the general denial, may show any legal or equitable defence he may have. 2 G. & H. 283, sec. 596. But the plaintiff in his complaint must state the facts constituting the cause of action, in plain and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended. 2 G. & H. 70, sec. 49, cl. 2. And when the allegation of the claim to which the proof is directed is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a variance, but a failure of proof. 2 G. & H. 116, sec. 96.

"The complaint in this case avers that the plaintiffs are the owners in fee of the land; proof that they were the equitable owners, and as such had the right to have the deed from the trustees set aside for a failure to comply with the conditions of the power, would not be a variance, but a failure of proof, under the code.

"Under a complaint like this, the plaintiff can only recover on a legal title to the possession paramount to the legal or equitable title of the defendant. In *Stehman v. Crull*, 26 Ind. 436, it was held, that 'the action to "recover the possession of real property," under the code, where the complaint is on the legal title, takes the place of the old action of ejectment, and the plaintiff must show a legal title to the possession before he can recover.' "

The ruling of the court below seems to have been made, and is attempted to be sustained here by the counsel for the appellees, upon the ground that the title set out in the complaint and attempted to be proved by the appellants was an equitable, and not a legal one.

This, in our judgment, is incorrect. The appellants claimed to be the owners of the land in controversy by inheritance from their father. It is said by Washburn, that "another incident has already been anticipated, and that is, that if not aliened by deed or last will of the owner, estates in fee sim-

Brown *et al.* v. Freed *et al.*

ple descend without restriction to whoever is by law his legal heir or heirs, and this, whether the estate be corporeal or incorporeal, in possession, reversion, or remainder, and whether vested or contingent." 1 Washb. Real Prop. 60, sec. 72.

An estate of inheritance is defined by Burrill as follows: "A species of freehold estate in lands, otherwise called a fee, where the tenant is not only entitled to enjoy the land for his own life, but where, after his death, it is cast by the law upon the persons who successively represent him *in perpetuum*, in right of blood, according to a certain established order of descent. 1 Steph. Com. 218. Litt. sec. 1. Co. Litt. 237 b." Burrill Law Dict. 561.

The same author defines an estate in fee simple as follows: "An estate to a man and his heirs forever. Hale Anal. sec. 30. A species of estate of inheritance which a man has, to hold to him and his heirs general, that is, his heirs whether lineal or collateral, male or female; and which is often called an estate in fee, without the addition of the word simple. 1 Steph. Com. 220. 2 Crabb Real Prop. 6. The entire and absolute interest and property in land. Cruise's Dig. tit. i. sec. 44." Same page, *supra*.

The same author defines an equitable estate as follows: "An estate acquired by operation of equity, or cognizable in a court of equity; such as the estate or title of a person for whose use or benefit lands are held in trust by another, the latter having the legal estate; and the estate of a mortgagor, after the mortgage has become forfeited by non-payment, and before foreclosure. 1 Steph. Com. 217, 285, 328; 2 Crabb Real Prop. 5, secs. 947, 442." Burrill Law Dict. 551.

It was proved upon trial that Jacob Nidiffer was the father of the appellants; that he was seized in fee of the lands in dispute, and that he was dead, leaving the appellants his legal heirs. If he died seized of such lands, then the legal title and estate therein descended under the laws of this State to his children. In such case, they would own the entire and absolute interest and property in the land. If, however,

the ancestor made during his life a legal and valid conveyance of such lands, then he died disseized, and there was nothing to descend to the appellants, and they would have no interest in or title to such land. The appellants either had an estate of inheritance or nothing. The appellees did not hold the land in trust for them, but they claimed to be the owners in fee by successive conveyances from the ancestor of appellants. The question involved was, whether Jacob Nidiffer had made a valid conveyance of such lands during his life. The fact was not denied that he had made a conveyance, but the point in contestation was, whether such conveyance was valid and effectual to pass the title. If he was sane at the time of making such conveyance, the title passed. If he was insane, the deed was void and no title passed, but remained in him during life, and upon his death descended to and vested in the appellants. Suppose that the appellants had attempted to defeat the title of the appellees by proof that the deed which purported to have been made by the said Jacob Nidiffer was a forgery, would any one doubt that such proof was competent, and if the fact was established, that the appellants were the owners in fee of such lands? If it would have been competent to have proved that the supposed deed had been forged and was therefore void, why was it not competent to prove that it was inoperative and void by reason of the want of mental capacity in the grantor to make any valid deed? We can see no difference, in principle, between the case supposed and the one involved in the case under consideration.

We think the court erred in excluding the evidence, for which the judgment must be reversed.

There are other questions discussed by counsel, but they are not likely to arise upon another trial, and will not, therefore, be considered.

The judgment is reversed, with costs; and the cause is remanded, for a new trial.

Hodson *et al.* v. Davis.

43	258
128	477
43	258
156	571

HODSON ET AL. v. DAVIS.

MARRIED WOMAN.—Contract.—The promissory note of a married woman is absolutely void. Such note, although given for property purchased for her own use, she having a separate estate and her husband being insolvent, is not evidence of her intention to charge her separate estate with the payment of the debt named in the note.

SAME.—Intent to Charge Separate Estate.—The fact that credit for goods sold to a married woman is given upon faith of her separate property, is not sufficient to create a charge against her lands or income; she, also, must contract with regard to her separate property.

SAME.—Complaint.—Husband.—A complaint against husband and wife on a note, alleging that it was executed by both for property sold to the wife, and praying judgment only against the separate property of the wife, presents no cause of action against the husband.

SAME.—Appeal.—In such case the husband, by virtue of the marital relation, may properly join in an appeal from a judgment against the property of the wife.

From the Montgomery Common Pleas.

J. M. Butler, for appellants.

T. Patterson, for appellee.

BUSKIRK, J.—By the original complaint in this action the appellee sought to recover a personal judgment against both the appellants, upon a promissory note executed by them to John W. Miller, and which by successive assignments had become the property of the appellee.

After the issues had been formed, the plaintiff asked and obtained the leave of the court below to file an amended complaint, and thereupon he filed a complaint in three paragraphs, which must be regarded as a substituted complaint.

In the first paragraph, it was alleged that the defendants, by their promissory note, of the 2d day of Feb. 1869, agreed to pay to John W. Miller the sum of one hundred and eighteen dollars, which note had been assigned and was due and unpaid, etc.; that at the time when said note was so executed, the defendants were, and still are, husband and wife; that at such time Helen Hodson owned certain described real estate, in her own right and as her separate

property; that the note sued on was given for and in consideration of a certain horse, by the said Miller sold and delivered to Helen Hodson, and which horse was purchased and used for the sole and only use and benefit of the separate estate of the said Helen; and that the said David F. Hodson was at the time of such purchase and ever since had been hopelessly and notoriously insolvent.

The prayer of said paragraph was as follows:

“Wherefore plaintiff demands judgment that the said separate estate of the said Helen Hodson be charged with the payment of whatever is found to be due on said note as principal and interest, and also for the sum of fifty dollars attorneys’ fees as provided in said note, and that the rents and profits arising from said lands be applied to the satisfaction of said debt, and for any and all other relief consistent in the premises.”

The second paragraph of the complaint was the same as the first, except that, in the second, it was averred that the horse, which was the consideration of the note sued on, was sold solely upon the credit of the said Helen; that by the execution of such note, the said Helen intended thereby to charge her separate estate; and that said Miller sold his horse and took the said note expecting and believing that the same would create a lien upon the separate property of said Helen.

The third paragraph was the same as the first, except that it was averred that David F. Hodson was the principal in the said note, and the said Helen was his surety; that the said David F. was and is hopelessly and notoriously insolvent; that the said Helen was the owner in her own right of certain described lands, which she was engaged in cultivating; that she owned all the live-stock on said farm and received and appropriated to her sole and separate use all the products of the said farm; that the said David F. Hodson was a mere supernumerary in the household and about the premises of the said Helen, acting as her agent in the transaction of all her business and working merely for his

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board and clothes; that the said horse was purchased for the purpose of aiding in the cultivation of the said farm of the said Helen, and ever since the purchase of said horse it had been used solely and only for such purpose; that the said Helen and her said separate property had been solely benefited by the said horse, and that when the said Helen executed the said note, she intended to charge her separate estate with the payment thereof.

The prayer of the second and third paragraphs of the complaint was the same as in the first.

The appellants demurred separately to each paragraph of the substituted complaint, but the demurrers were overruled, and they excepted.

David F. Hodson answered separately in three paragraphs. In the first, he attempted to defeat a recovery on the note, upon the ground that false and fraudulent representations had been made by Miller in reference to the horse for which the note was given. In the second, he set out a warranty and its breach.

The third was in denial.

The plaintiff replied in denial of the first and second paragraphs of the separate answer of David F. Hodson.

Helen Hodson answered separately in two paragraphs.

In the first paragraph of the separate answer of Helen, she admitted the execution of the note sued on, but averred that her co-defendant, David F., was the principal, and that she was the surety only; that at the time when said note was executed, she was and ever since had been the wife of her co-defendant, David F. Hodson; that the horse for which the note was given was not purchased for her benefit, or for the use and benefit of her separate estate.

In the second paragraph, she averred that at the time of the execution of the note sued on, she was, ever since that time has been, and still is, a married woman, the wife of her co-defendant, David F. Hodson, and that she signed the said note at the request of her said husband.

The plaintiff demurred separately to each of these para-

graphs. The court sustained the demurrers, and Helen refusing to plead further, the court rendered judgment against her, and she excepted.

The matters in issue between the plaintiff and David F. Hodson were submitted to a jury for trial. The jury returned the following verdict:

"We, the jury, find there is due the plaintiff on the note sued upon, as principal and interest, the sum of one hundred and twenty-one dollars and fifteen cents, and, also, that there is due the plaintiff the sum of twenty-five dollars as attorneys' fees.

JOHN W. BURK, Foreman."

The defendants moved the court for a new trial, assigning therefor various reasons, which motion the court overruled, and they excepted.

The court thereupon rendered the following judgment:

"It is therefore considered by the court that the said Simon C. Davis do have and receive from the rents and profits of the said separate estate of the said Helen Hodson the sum of one hundred and twenty-one dollars and fifteen cents, as principal and interest of said note, and also the sum of twenty-five dollars as attorneys' fees in said cause, and that John H. Cochran be appointed a receiver, who in default of payment of said amounts by the said Helen Hodson shall take charge of said separate estate and retain the control of the same until the rents, issues, and profits thereof satisfy the sum so found to be due plaintiff as well as attorneys' fees and costs herein, to which judgment of the court defendant excepts."

The appellant David F. Hodson has assigned for error the refusal of the court to grant him a new trial.

We will dispose of this assignment of error before we consider the more important questions presented by the assignments of error of Helen Hodson.

The original and amended complaints are wholly inconsistent. In the first, a personal judgment was asked against both the defendants. In the second, the only judgment demanded was one *in rem* against the separate estate of

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Helen. We are of the opinion that the last complaint filed was not an additional, but a substituted complaint, and being such the appellant David F. Hodson ceased to be a party against whom any relief was demanded.

3 All the proceedings subsequent to the filing of the substituted complaint, so far as they related to the said David F. Hodson, as a defendant against whom a judgment was demanded, were irregular and erroneous. There was nothing for him to answer in the substituted complaint. There was no real issue formed between him and the plaintiff. There was no question of fact submitted to the jury. The verdict rendered was a mere nullity. The said David F. Hodson was simply retained as a defendant by reason of his being the husband of the said Helen Hodson, against whom a judgment *in rem* was sought, and in that capacity he has properly joined in this appeal.

The appellant Helen Hodson has assigned for error the following :

1. The overruling of her motion for a new trial.
2. The overruling of the demurrer to the complaint.
3. The sustaining of the demurrer to the first and second paragraphs of the answer.
4. The rendition of the judgment.

5 The first assignment of error presents no question for our decision. As judgment was rendered against her on demurrer, there was no trial of fact as to her, the damages being assessed by the court by a mere computation. Where a party permits judgment to go on demurrer, and the court or jury hears proof as to the damages, a motion for a new trial is proper as to matters relating to the assessment of damages.

The fourth error is not available. The court very properly rendered judgment against her for want of an answer, upon her refusal to plead further. *Mangeot v. Block*, 11 Ind. 244; *Sage v. Matheny*, 14 Ind. 369.

Inasmuch as the second and third assignments of error present substantially the same question, we will consider

them together. Was the appellee entitled to the relief prayed for and granted, upon the facts stated in either paragraph of the complaint? and if he was, did the facts stated in the answer constitute a defence? The facts stated in the second paragraph of the complaint were more favorable to the appellee than those in the other paragraphs. We will therefore consider the sufficiency of the second paragraph.

What are the material averments? They are, that David F. and Helen were husband and wife; Helen owned and held as her separate estate a valuable farm which she was cultivating; that she owned all the farming implements and live stock thereon and appropriated to her own separate use all the products of said farm; that the horse, which was the consideration for the note sued upon, was needed and exclusively used for the cultivation, and was necessary to the full and complete enjoyment of her separate property; that by the execution of the note she intended to create a charge upon her separate estate; and that the payee of the note parted with his horse and accepted of the note in the belief that he held a lien upon her separate estate.

It was said by this court, in *O'Daily v. Morris*, 31 Ind. 111, that "it is a rule of the common law, too familiar and well settled to need the citation of authorities, that a *feme covert* is incapable of binding herself by an executory contract, and that all such contracts made by a married woman, whether in writing or by parol, are absolutely void at law. There is nothing in the legislation of this State in relation to married women changing this rule of the common law, at least so far as it applies to such contracts at large."

This court held in *Johnson v. Tutewiler*, 35 Ind. 353, which was an action upon a note executed by a married woman and her husband and to enforce a mechanic's lien for improvements made upon her separate property, that the note as to her was absolutely void and created no lien upon her separate estate. The note of Helen was void and created neither a personal liability against her nor a lien upon her separate property.

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The fact that credit for goods sold to a married woman is given upon faith of her separate property, is not sufficient to create a charge against her land or income; she must also contract with regard to her separate property. *Hasheagen v. Specker*, 36 Ind. 413, and authorities there cited. See also *Coats v. McKee*, 26 Ind. 223; *Stevens v. Parish*, 29 Ind. 260; *Montgomery v. Sprankle*, 31 Ind. 113; *Armstrong v. Nichols*, 32 Ind. 408.

As the note of Helen was void and did not create either a personal liability against her or a charge upon her separate property, it could not be used as evidence of an intention on her part to charge her separate property.

It is charged in the complaint that by the execution of the note she intended to create a charge upon her separate estate, and that the payee of the note parted with his horse and accepted of the note in the belief that he held a lien upon her separate estate.

It is not charged in the complaint that there was any agreement or contract, other than that contained in the note. The intent to charge her separate estate is only evidenced by the execution of the note. The note upon its face does not show any such purpose, and there being no independent agreement to that effect, the complaint does not show any contract to charge the separate estate of Helen. This renders it unnecessary for us to express any opinion as to whether a lien can be created upon the separate property of a married woman by the purchase of a horse to be used in the cultivation of a farm which she holds as her separate property.

We think the court erred in overruling the demurrer to the complaint.

Did the court, in sustaining the demurrer to the first paragraph of the answer, commit an error? In that paragraph Helen admitted the execution of the note, but averred that she then was the wife of her co-defendant; that her husband was the principal in said note, and that she signed it as his surety only; and that the horse, for which the note was

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given, was not purchased for the use or benefit of her separate estate.

It is very obvious that if the horse in question was not purchased by her for the use and benefit of her separate estate, and if such horse was purchased by her husband, and if she only signed the note as his surety, no charge was created against her separate estate. The husband cannot by his contract create a lien or charge upon the separate estate of his wife. *Johnson v. Tutewiler, supra.*

In our opinion, such paragraph of the answer would have constituted a valid defence to a good complaint, and the court erred in sustaining the demurrer thereto.

The only material averment in the second paragraph of the answer was, that she was a married woman at the time she executed the note. The same averment was in the first paragraph of the answer. The second paragraph was not good, but if it had been, there would have been no error in sustaining the demurrer to it, as the same proof could have been made under the first.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court to sustain the demurrer to the complaint, and for further proceedings in accordance with this opinion.

BUSENBACK ET AL. v. THE ATTICA AND BETHEL GRAVEL ROAD COMPANY.

TURNPIKE.—Articles of Association.—It is essential to the legal existence of a corporation organized under the act of May 12th, 1852, as amended by the act of 1859, authorizing the construction of plank, etc., roads, that the articles of association shall set forth the residence of each and every subscriber thereto. *Eakright v. The Logansport and Northern Indiana Railroad Co.*, 13 Ind. 404, criticised.

From the Fountain Common Pleas.

Busenback *et al.* v. The Attica and Bethel Gravel Road Co.

T. F. Davidson and *M. Milford*, for appellants.

Wallace & Rice, for appellee.

BUSKIRK, J.—This was an action by the appellants, to enjoin the collection of certain assessments made for the construction of the Attica and Bethel Turnpike Company, upon the ground that the said company had never been legally organized.

The single question presented by the record in this case is whether it is essential to the legal existence of a corporation organized under the act of May 12th, 1852, "authorizing the construction of plank, macadamized, and gravel roads," that its articles of association shall set forth the residence of each and every subscriber thereto.

The first section of said act, as amended by the act of 1859, reads as follows:

"Be it enacted by the General Assembly of the State of Indiana, that any number of persons may form themselves into a corporation for the purpose of constructing or owning plank, macadamized, gravel, clay and dirt roads, by complying with the following requirements: They shall unite in articles of association, setting forth the name which they assume, the line of the route, and the place to and from which it is proposed to construct the road, the amount of capital stock, and the number of shares into which it is divided, the names and places of residence of the subscribers, and the amount of stock taken by each, shall be subscribed to said articles of association. Whenever the stock subscribed amounts to the sum of five hundred dollars per mile of the proposed road, copies of the articles of association shall be filed in the office of the recorder of each county through which the road is to pass, and shall from that time be a corporation, known by the name assumed in [its] articles of association." 1 G. & H. 474.

In the present case, every requirement of the above section was fully complied with except setting forth "the places of residence of the subscribers." There were twenty-seven

subscribers to the articles of association, and the places of the residence of only two of them are set forth.

It is insisted by counsel for appellants, that setting forth the places of residence of the subscribers is imperatively required by the statute, and is absolutely essential to the legal existence of the corporation, and that if one of the requirements of the statute may be dispensed with, all may be; that it has not been left to construction, but that the legislature has prescribed the terms and conditions, upon a compliance with which a corporation may be organized, as is shown by the use of the following words: "By complying with the following requirements."

On the other hand, it is argued that the failure to affix to the names of the subscribers their places of residence is a mere formal defect of a very technical character. It does not go to the existence or constitution of the corporation. It goes only to the description of the persons who compose it. When their names are given, the subscribers are sufficiently identified, and the statute is substantially complied with.

It is further contended by counsel for appellee, that while a strict construction will be adopted as to questions relating to the power of dealing in a corporate capacity, a liberal construction will be adopted as to questions relating to the mere manner of getting into operation or acquiring a corporate existence.

Counsel for appellee refer to and rely upon the case of *Eakright v. The Logansport, etc., Railroad Co.*, 13 Ind. 404, as establishing the proposition that the requirement to state the place of the residence of the subscribers is only directory.

The question in that case was, whether the setting forth, in the articles of association, of the names of the directors was essential to the legal existence of the corporation. The court say: "Here the directors are not named in the articles of association; but it appears that they were elected at a meeting of the subscribers, after the stock was subscribed, and

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the articles were constructed; and further, at the same meeting at which they were elected, the same articles of association were expressly adopted by the subscribers. Indeed, all the requirements of the statute have, in this instance, been literally pursued, save that of naming the directors in the articles of association, and that, it seems to us, has, in effect, been done by the adoption of the articles when the directors were elected."

The court held that there had been a substantial compliance with the requirements of the statute, as the names of the directors had been, in substance and effect, set forth. But the court, after having decided the real question involved, proceeded to express an opinion upon a point that did not arise in the record, as the statute had been in effect complied with. The court say: "At all events, the requirement that they be named in the articles, may be held merely directory, and not, in view of the facts stated in the complaint, essential to the validity of the corporation." The facts referred to, as having been stated in the complaint, were those showing that the names of the directors had, in effect, been given. In our opinion, that portion of the above decision which held the requirement merely directory is not entitled to much weight or consideration, because the point was really not before the court, and the statement is made with a qualification that greatly weakens its force.

The cases of *Piper v. Rhodes*, 30 Ind. 309, and *Rhodes v. Piper*, 40 Ind. 369, are much in point. In such cases we held that the requirements of the above section of the statute were not merely directory, but were imperative and should be substantially complied with. The omission was the failure to set forth in the articles of the association the name of such association. The one requirement is, under the statute, as imperative and essential as the other.

The case of *The State, ex rel. O'Brien, v. The Bethlehem, etc., G. R. Co.*, 32 Ind. 357, involved a construction of the above quoted section of the statute. It is plainly inferrible from the language used by the court, that it was intended to

hold that there must be a substantial compliance with all the requirements of the statute. The court say: "The information is unskilfully drawn, is uncertain in many of its averments, and contains much useless matter; but we think that the matters alleged in the first specification are sufficient, if true, which the demurrer admits, to show that the association has failed to comply with several of the requirements of the statute which are essential to a legal organization as a corporation."

The omissions complained of were as follows: "The first charge alleges, that the pretended articles of association did not set forth the name assumed by the company; that the articles of association do not contain an intelligent description of the line of the route and the place from and to which it is proposed to construct the road; nor does it contain the amount of the capital stock of the company or the number of shares into which it is divided, or the names and places of residence of the subscribers and the amount of stock subscribed by each."

The precise question involved in the case under consideration was involved in the above case, and the court held that it was essential to the legal organization of the corporation that the names and places of residence of the subscribers must be set forth in the articles of the association. Such is the plain requirement of the statute. The requirements enumerated in the first section of the act are plainly and distinctly set forth, and it is expressly declared in such section that a corporation may be organized by complying with the requirements therein specified. We are now asked to hold that the corporation was legally organized by complying with a part of such requirements. The legislature has made no discrimination between the requirements, by making some of them directory and others imperative, and we possess no power to do so. The legislature has declared, in plain and unambiguous language, that "the names and places of residence of the stockholders" shall be set forth in the articles of association, and the effect of the failure to

make such allegation is not left to construction, but is made a condition precedent to the legal organization of the corporation.

In *Garrigus v. The Board of Commissioners of Parke County*, 39 Ind. 66, we laid down certain rules of construction as applicable to corporations, to which we adhere.

The learned counsel for appellee have pressed upon our consideration the inconvenience and loss which would result from our holding the organization of the corporation incomplete, by reason of the failure to set forth in the articles of association the places of residence of the stockholders. There is no hardship or injustice in requiring those who seek to be clothed with the power of imposing taxes upon the property and burdens upon the shoulders of others to comply with the plain, unambiguous, and undoubted requirements of the statute which confers the power. The legislature has prescribed the conditions upon which these corporate and extraordinary powers may be exercised, and it is but reasonable and just that those who accept the benefits conferred should comply with the conditions imposed. If loss and inconvenience result, it may have a tendency to induce persons getting up such organizations to secure the services of persons possessed of sufficient knowledge and skill to perfect an association in conformity with the law, and thus relieve corporations from expensive litigation and the courts from being crowded with unnecessary suits. The gravel road and ditching associations have been a fruitful source of vexatious and expensive litigation, the most of which could have been prevented by the exercise of care and skill. The disastrous consequences of the want of care, skill, and prudence should teach wisdom to those engaged in organizing and managing such associations.

In the case in judgment, the capital stock was twelve thousand dollars. The two stockholders whose places of residence are given subscribed for fifteen hundred dollars of stock, a sum wholly insufficient to authorize the organization of the corporation. In legal effect, the case therefore stands

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as though none of the places of residence of the stockholders were set forth.

In our opinion, the court below erred in sustaining the demurrer to the complaint.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to overrule the demurrer to the complaint, and for further proceedings in accordance with this opinion.

43	271
126	463

GINN, EXECUTOR, v. COLLINS.

DECEDENTS' ESTATES.—*Claim.*—No formal complaint is necessary in prosecuting a claim against the estate of a decedent; a succinct statement of the nature and amount of the claim is all that the statute requires. A statement of an account which would be a good cause of action against a living defendant before a justice of the peace, is a sufficient statement of a claim against a decedent's estate.

SAME.—*Evidence.*—As a general rule, a party may introduce his evidence in the order in which he prefers; therefore, on the trial of a proceeding to enforce a claim against a decedent's estate, it was not error to admit evidence of the value of personal service rendered by the plaintiff to the decedent (his father), before any proof was given of an express promise by the decedent to pay for such services.

SAME.—*Witness.—Executor.*—On the trial of a claim for services rendered to a decedent in his lifetime, the personal representative cannot testify as a witness, unless called as such by the opposing party or by the court.

From the Delaware Common Pleas.

W. March, C. E. Shipley, and W. Brotherton, for appellant.
T. S. Walterhouse, J. S. Buckles, and J. W. Ryan, for appellee.

DOWNEY, C. J.—This was a claim filed by the appellee against the estate of the said testator, in the common pleas. The cause having resulted in a judgment allowing the claim, the executor appealed to this court, and has here assigned as errors, 1. The overruling of his demurrer to the com-

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plaint. 2. Overruling his motion for a new trial. 3. Overruling his motion for a *venire de novo*. 4. Overruling his motion for judgment *non obstante veredicto*.

There are two claims copied into the transcript. As the last one covers fully the first, it must be held to have superseded the first, according to section 559, p. 273, 2 G. & H. As there does not appear to have been any demurrer to the first, we will presume that the demurrer which was filed and overruled was intended to apply to the last complaint or claim filed.

This claim is as follows :

"The estate of Elijah Collins, dec'd, Dr.

"In account with George W. Collins.

"To board, services, and maintenance in taking care of and providing for said Elijah Collins, and for care and provisions for him in his last illness to the time of his death, February 24th, 1870, said board, care, and maintenance extending from October 10th, 1867, to February 24th, 1870, \$1200.00."

This is followed by a bill of particulars, in which the items are set forth thus :

"The estate of Elijah Collins, deceased.

"In account with George W. Collins.

To board and lodgings from Oct. 10th, 1867, to February 24th, 1870, 120 weeks, @ \$4.50,	\$540.00
To services in taking care of and nursing said Elijah Collins during his last illness, during said years,	600.00
To necessities furnished said Elijah Collins during his last illness, during said years,	400.00
To amount expended for nursing and caring for said Elijah Collins during said time, not included in either of the foregoing items,	460.00

\$2,000.00"

The ground of demurrer to the cause of action, claim, or complaint, was, that it did not state facts sufficient to constitute a cause of action. The statute does not require a

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regular complaint in such cases, but only a succinct statement of the nature and amount of the claim. 2 G. & H. 501, sec. 62. This court said in *Hannum v. Curtis*, 13 Ind. 206: "The statute to which we have referred, does not require a regular complaint under the ordinary rules of pleading, but merely a succinct statement of the claim, which, it seems to us, will be sufficient when it apprises the defendant of the nature of the claim, of the amount demanded, and shows enough to bar another action for the same demand. These have been ruled to be the requirements of what the law denominates a concise statement of a cause of action in justices' courts, and we perceive no reason why they may not be effective as the proper elements of the statement of a claim against a decedent's estate. R. S. 1843, p. 870, sec. 39; 4 Blackf. 13; 5 Blackf. 40; 11 Ind. 203." See also *Johnson v. Kent*, 9 Ind. 252. If the items which make up the amounts of the third and fourth sums in the bill of particulars should have been set forth more specifically, counsel should have asked this by a motion. If any part of the claim was sufficient, a demurrer to it generally could not be sustained. We think the complaint was sufficient, and that the court committed no error in overruling the demurrer thereto.

The defendant's answer consisted of a paragraph of general denial. Second, payment by the deceased in his lifetime. Third, payment by the executor. And fourth, set-off. The plaintiff replied in denial of the second, third, and fourth paragraphs of the answer. Not all the reasons for a new trial stated in the common pleas are relied upon in this court. Such of them as are urged here by counsel we will consider. On the trial, the plaintiff asked several of his witnesses this question: "What, in your opinion, was the care and attention bestowed on deceased worth?" The defendant objected to the question being asked, for the reason that the care and attention bestowed on said deceased were bestowed by said plaintiff and Isabella Custer jointly,

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because said Isabella, at the time of this trial, had an action pending in the same court for her services in giving such care and attention, because said services could not be recovered for at all, unless by virtue of an express contract of the deceased to pay for the same, the plaintiff, said Isabella, and the deceased being father and his children at the time of such services, living together as members of one family, and because such contract, if any, was made by the deceased to and with the plaintiff and said Isabella jointly. These objections were not allowed, and the witnesses were permitted to answer the question. In their brief counsel for the appellant say: "Under ordinary circumstances, the question would be unobjectionable. This, however, was an action brought by a son against the estate of his father, to recover for services rendered to the father at a time when father and son and daughter were living together as members of one common family, rendered under circumstances which allowed of no recovery of their value by the plaintiff, except upon express agreement of the deceased to pay therefor. The evidence shows the services to have been rendered by the plaintiff and his sister jointly. The question should have been, 'What were the services rendered by the plaintiff worth?' As the case now stands, George W. Collins has recovered the value of all the services rendered by himself and his sister, and she may recover the value of the services rendered by her in the suit now pending, in which she is plaintiff."

Strictly, the question should have been as to the value of the care and attention bestowed on the deceased by the plaintiff. But we think the question must have been so understood, as it could hardly have been supposed that a compensation for the services bestowed by the sister could be allowed in the action in favor of the plaintiff. The ground of objection, that the son could only recover upon proof of a special contract, was not a valid reason why he should not be allowed to prove the value of the services rendered by him. He had a right to introduce the evidence

of these facts in his own order. It was for the jury to decide whether or not there was proof of the contract or agreement by the deceased to pay for the services, etc. The court could not assume that the contract had not been shown, or would not be shown, as a reason why the value of the services should not be proved. The proof of the contract to pay need not necessarily precede the proof of the value of the services. The order of time in which the party will introduce the evidence in support of the different parts of the action or defence will, generally, be left to the discretion of the party introducing the evidence. *Throgmorton v. Davis*, 4 Blackf. 174.

But on another ground, we think there is little or no merit in this objection to the action of the court in this case. The jury found specially in answer to interrogatories propounded by the defendant, that there was a contract between the deceased and the plaintiff, by which the deceased was to pay the plaintiff for the services, that it was not made with the plaintiff and his sister jointly, and that the amount found by them in their general verdict was due to the plaintiff after deducting the amount allowed of the set-off.

The next reason relied upon for a new trial is, that "the court erred in refusing to allow the executor to be sworn, and to testify generally as a witness on behalf of the defendant." There was no error in this ruling. By the express provision of the statute, neither party, in such a case, is competent to testify, unless required by the opposite party, or by the court trying the cause. 3 Ind. Stat. 561, 1st proviso.

It is next insisted that the court erred in allowing the sister of the plaintiff to testify. It is urged that she was equally interested with the plaintiff in the recovery. We think this objection is founded upon a misapprehension of the facts of the case, and is not well founded.

Counsel do not urge the third assignment of error, that is, that the court should have awarded a *venire de novo*. We see no ground for the motion. The general verdict was as follows: "We, the jury, find for the plaintiff and assess

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his damages at seven hundred and thirty-six dollars and fifty cents."

There is no ground for the motion for judgement *non obstante veredicto*. The defendant denied generally the complaint, and the plaintiff denied generally the set-off. In such case, we do not see how there could be a judgment for the defendant on the pleadings, or *non obstante veredicto*.

We find no ground for a reversal of the judgment.

The judgment is affirmed, with five per cent. damages and costs.

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43	276
152	137

43	276
1169	656

SPECIFIC PERFORMANCE.—*Tender*.—Where a purchaser of real estate brings suit for the specific performance of an executory contract of sale, it is not necessary that he should make an unconditional tender of the purchase-money and pay the same into court. It is sufficient for him to tender the money on condition that a deed is made to him, and upon the refusal of the vendor to accept the money and perform his contract, the vendee may bring his action and show in the complaint such tender and refusal, and that he is ready, able, and prepared to pay whatever sum may be found due, upon a decree for a specific performance.

STATUTE OF LIMITATIONS.—*Demand*.—A. sued B. for the specific performance of a contract for the conveyance of real estate. In his complaint A. alleged a tender and refusal of the purchase-money, and brought the same into court, and it remained in the hands of the clerk. After years of litigation, a final decree was rendered in favor of A. The executors of B. then demanded said sum of money of the administrators of the clerk, who had died, and on their refusal to pay, suit was brought for its recovery. Answer, that more than six years had elapsed since the right of action accrued, prior to the commencement of suit.

Held, that the statute of limitations did not commence to run against the plaintiffs until after a demand upon the defendants for the return of the money.

PRACTICE.—*Special Finding*.—When a party desires to object to the conclusions of law upon a special finding by the court, he should except to such conclusions of law; a motion for judgment on the special finding in favor of the

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party against whom the finding is made presents no question for review in the Supreme Court.

SAME.—Motion.—Bill of Exceptions.—Motions to strike out portions of pleadings, to reject pleadings, or to require the separation of the same into distinct paragraphs, are unavailing on appeal to the Supreme Court, unless incorporated into the record by bill of exceptions.

From the Putnam Common Pleas.

S. Turman and *J. Birch*, for appellants.

D. E. Williamson and *A. Daggy*, for appellee.

BUSKIRK, J.—We cannot so fully show what this suit was brought for as by copying the complaint in full, which is as follows:

“State of Indiana, Putnam Common Pleas Court, June term, 1867. John S. Jennings, administrator of the estate of Isaac Ash, deceased, *v.* John Lynch and Armilda R. McGinnis, executors of the last will and testament of Jacob McGinnis, deceased. Comes now the said John S. Jennings as administrator of the estate of Isaac Ash, deceased, and for amended and substituted complaint herein, says that in 1849 the said Ash contracted and sold to one Jacob Daggy a certain tract or parcel of land situated in said county. And the said Ash refusing to convey the same, the said Daggy then and there commenced his suit for the specific performance of the same against the said Ash; and for the purpose of carrying out his legal proceeding against the said Ash, then and there deposited in the circuit court of said county, where said suit was then pending, the purchase-money or consideration for said land, amounting to the sum of seven hundred and ninety-two dollars and seventy-five cents in gold, and then and there placed the same in the hands of Jacob McGinnis, who was then and there the clerk of said court and became the custodian of said money. And the plaintiff says that such proceedings were afterward had, that the said court by its order and decree vested the title of said land in the said Jacob Daggy, then and there leaving the purchase-money aforesaid in the custody aforesaid, the property of the said Ash. And the plaintiff further says

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that afterward the said Ash departed this life, and letters of administration were duly granted on his estate to Oliver P. Ash, who, as such administrator, drew said seven hundred and ninety-two dollars and seventy-five cents out of the hands of the said McGinnis as a part of the assets in said estate. And the plaintiff further says that afterward the heirs of said Isaac Ash, deceased, prosecuted their writ of error to the Supreme Court of the State, for the purpose of reversing the decree of the Putnam Circuit Court in the matters of said land, and for the purpose of prosecuting said writ, the said plaintiff, as administrator *de bonis non* of the estate of said deceased, at the instance and request of said heirs, re-deposited the said money, seven hundred and and ninety-two dollars and seventy-five cents, with the said McGinnis, still remaining said clerk, and then and there took his receipt for the same, which is now made a part of this complaint by copy. And the plaintiff says that on said writ of error aforesaid, the Supreme Court of the the State reversed and set aside said decree of the Putnam Circuit Court, leaving the title to said lands in the said Ash's heirs. But the plaintiff charges that in the meantime, before the prosecution of said writ of error, the said Daggy had contracted and sold to divers persons parts and subdivisions of said lands so purchased of said Ash as aforesaid, and perfected the same by conveyances, etc., and held the possession of all said tract.

“And the plaintiff further says that afterward the heirs of said Ash, deceased, commenced their legal proceedings in the common pleas court of said county, against the said Jacob Daggy and others, for the purpose of settling all questions of title and rights of possession to said tract of land described in said first suit against said Ash, and to have partition of the same according to their respective legal rights, and such proceedings were thereupon had that partition was ordered, four-fifths to the heirs of said Ash, deceased, and one-fifth to the said Daggy. And the plaintiff further says that the said Daggy and others prayed and

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took their appeal to the Supreme Court from the decree of the Putnam Common Pleas, and such proceedings were thereupon had that the Supreme Court reversed and set aside said decree, and declared the title to said lands involved in the said first and last litigation to be in the said Jacob Daggy and his assignees, by virtue of his purchase first above alleged and the decree of said Putnam Circuit Court thereon, with directions to dismiss the suit of said Ash's heirs, and to render final decree for the said Daggy and his assigns, then and there and thereby vesting and quieting the title to said lands in said Daggy and his assigns, a copy of which decree is filed, and divesting the heirs of the said Ash of all claim or title to said lands. And the plaintiff further says that during all the time aforesaid, the money so deposited by the said Jennings, as the administrator of the estate of the said Ash, remained in the hands of the said McGinnis, and equitably became the money of the estate of the said Ash, deceased; that it was the consideration-money for said lands, and as the lands were finally decreed to be in the said Daggy and his assigns, that he, as such administrator, should draw the money out of the hands of the said McGinnis, for the purpose of making the same assets to pay debts of said Ash. And he further says that said McGinnis died testate, and that John Lynch and Armilda R. McGinnis became executors of the estate of said deceased, and that said estate is yet pending in court, and that he demanded said money of said Lynch, who refused to pay the same. He makes said Daggy a party to this proceeding, and prays a judgment against the estate of said McGinnis for said sum of money, and for other proper relief."

The receipt referred to in and made a part of the complaint is as follows:

"Whereas Jacob Daggy instituted a suit in the Putnam Circuit Court against Isaac Ash, and paid into court for the use of said Ash seven hundred and ninety-two dollars and seventy-five cents, which was refused by said Ash in his lifetime, but was taken out by the administrator of said Ash,

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without the consent of the heirs of said Ash, as is said; and whereas the said heirs have prosecuted the said action into the Supreme Court and directed the administrator *de bonis non* to re-deliver said sum to the clerk of the Putnam Circuit Court, to abide the event of that suit, and said administrator has this day deposited for the purpose aforesaid said sum of seven hundred and ninety-two dollars and seventy-five cents in my office, July 27th, 1855.

“JACOB MCGINNIS,

“Clerk of the C. C. of Putnam County.”

It appears by the return to a *certiorari*, that the above complaint was filed as a claim against the estate of Jacob McGinnis, deceased; and that such claim was placed on the appearance docket for allowance, and not being allowed, was transferred to the issue docket for trial. There was also filed with, and as constituting a part of the above complaint, a bill of particulars showing the nature of the claim. The claim was sworn to.

A demurrer was overruled to the complaint, and the appellants excepted.

The appellants then filed an answer consisting of seven paragraphs. The substance of the several paragraphs was as follows:

1. The general denial.
2. Payment by McGinnis to plaintiff.
3. That the money deposited by the plaintiff was the money of the heirs of said Ash, deceased; the names of the heirs are given; that the same was a special deposit made by said heirs, through and by the administrator of said estate, and amounted to a payment by said administrator to said heirs of so much of their distributive shares of said estate, and that it was regarded and treated as such payment by such administrator and the said heirs; that subsequent to such deposit one of the heirs of said Ash sold and conveyed her interest in the lands in controversy to Addison Daggy, and transferred her interest in the money so deposited to said Daggy, who, with the knowledge of the

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plaintiff and said heirs, received from McGinnis, clerk, the sum of one hundred and fifty-eight dollars and fifty-five cents, that being the one-fifth part thereof; wherefore, that the residue of said money belongs to the balance of such heirs.

4. That the money so deposited was a re-deposit of certain moneys that had theretofore been deposited with the said clerk by one Jacob Daggy, in support of a tender of payment for certain lands alleged to have been purchased by him of said Isaac Ash, and for conveyance of title to which said lands he brought his said action, and which money is charged to have been lifted by the administrator of said Ash, deceased, after his death and without the consent of the heirs of the said Ash, and which was under the direction of the said heirs, and to enable them to prosecute said action so brought as aforesaid to the Supreme Court, and that said money was especially re-deposited to abide the event of said suit; and that said suit was prosecuted to final decision in the Supreme Court, where said cause was reversed, and the court below was directed to render judgment for such heirs, and that final judgment was rendered by the circuit court on the 2d day of April, 1857, when the right of such heirs to demand and receive such money became fixed and absolute, and that more than six years had elapsed since the right of action had accrued and the bringing of the action.

5. The fifth paragraph, after giving a full history of the several suits between Daggy and Ash, and the heirs of Ash and assignees of Daggy, as set out in the complaint, alleges that the money so deposited became the money of the said Jacob Daggy.

6. The sixth paragraph alleges that McGinnis ceased to be clerk of said county on the — day of —, 1859, and was succeeded by one Melvin McKee, who by virtue of his office became the legal custodian of the books, papers, records, and effects of the office of clerk of said county, and concludes with an averment that the suit to

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recover the money so deposited should have been brought against the said McKee, and not against the estate of the said McGinnis, deceased; but it is not alleged as a matter of fact that the money so deposited with the said McGinnis was by him paid over to his successor in office.

The seventh paragraph of the answer is as follows :

“7. And for further and seventh amended answer to the said action of the plaintiff, the defendants say that said money referred to in the complaint was specially deposited with said McGinnis by the heirs of Isaac Ash, deceased, for the purpose of enabling them to prosecute their writ of error to the Supreme Court in the said action brought by Jacob Daggy against Isaac Ash and first referred to in said complaint, and for said heirs; and at their instance and request as averred in said complaint, the plaintiff made said special deposit of said money, as shown by the writing styled by plaintiff a ‘receipt,’ a copy of which is attached to said complaint, and as is averred in said complaint.

“And defendants charge that after making said deposit as aforesaid for said heirs, the said plaintiff had no right inchoate, contingent, or otherwise in said deposit money. And defendants say that the plaintiff in his affidavit attached to said complaint recognized a payment by said McGinnis to one Addison Daggy, as the assignee of Evaline Holland and her husband, Granville Holland, who are of the heirs of the said Isaac Ash, deceased, there being five children and heirs, and the said Evaline Holland being one of said five; that said plaintiff therein on oath stated that ‘one-fifth thereof,’ meaning said deposit money, one hundred and fifty-eight dollars and fifty-five cents, has been paid. And defendants charge that said payment so as aforesaid recognized by the plaintiff was made to Addison Daggy as such assignee of said Evaline Holland and husband, and to no other or different person; and defendants say that by reason of the premises, Oliver H. P. Ash, Isaac N. Ash, Eliza I. Hensley, and Cynthia M. Wingate and her husband, Robert M. Wingate, the four other and only heirs of said Isaac Ash, deceased,

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except said Holland and wife, are entitled to recover whatever sums of said deposit may be unpaid, and that plaintiff has no right thereto and is estopped and precluded by his own act and declarations under oath in said affidavit attached to the original complaint herein (which by reference is made part of this answer), as well as by the express terms and conditions of said deposit, from setting up any claim to said fund or any part thereof; wherefore," etc.

A demurrer was filed to all the paragraphs of the answer but the first. The demurrer was sustained to the fourth, fifth, sixth, and seventh, and overruled as to the second and third, and proper exceptions were taken.

The death of Jacob Daggy was suggested, and his administrator, Charles W. Daggy, was substituted as defendant, who filed an answer, in which he disclaimed any and all interest in said matters in said suit involved, and any claim to said money so deposited as in the complaint and answers alleged.

There was a reply to the second and third paragraphs of the answer.

The cause was, by the agreement of the parties, submitted to the court for trial. The court rendered a special finding of facts and his conclusions of law thereon, but we do not deem it necessary to set out the special finding of facts, because they are in substance those stated in the complaint. There was no exception to the conclusions of law, but there was a motion for judgment for the appellants upon such finding.

There was a motion for a new trial, which was overruled. The evidence is not in the record.

The appellants have assigned the following errors :

1. For error of court in overruling motion of defendants to compel plaintiff to paragraph his amended and supplemental complaint.

2. Error of the court in overruling demurrer to the complaint.

3. Error of the court in overruling the motion of the

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defendant to strike out certain portions of the complaint.

4. Error of the court in overruling defendants' motion to reject the separate answer of Charles Daggy, administrator of the estate of Jacob Daggy, deceased.

5. Error of the court in overruling motion to strike out certain parts of the separate answer of Charles W. Daggy.

The 6th, 7th, 8th, and 9th errors were based upon the action of the court in sustaining demurrers to the 4th, 5th, 6th, and 7th paragraphs of the answer.

10. Error of the court in overruling motion of the defendants for judgment in their favor upon the special findings of the court.

11. Error of the court in overruling motion for a new trial.

The 1st, 3d, 4th, and 5th assignments of error present no questions for our decision, for the reason that such questions are not reserved by a bill of exceptions.

The 10th assignment of error presents no question, because the appellants should have excepted to the decision of the court upon the conclusion of law. The motion for judgment on special findings presents no question for review here. *Crusan v. Smith*, 41 Ind. 288.

The evidence is not in the record, and consequently no question is presented by the 11th assignment of error.

This leaves for our consideration the 2d, 6th, 7th, 8th, and 9th assignments of error.

The material facts averred in the complaint and answers were these:

Jacob Daggy claimed to have purchased from Isaac Ash certain real estate, for which he owed him \$792.75. Daggy tendered to Ash that sum and demanded a deed. Ash refused to accept the money or make the deed. Daggy filed a complaint for a specific performance of the contract and paid into court for the use and benefit of Ash the above named sum in gold. An issue was formed and tried and resulted in a decree for a specific performance. Ash died intestate, and an administrator was appointed upon his

estate, who received from the clerk of said court the above named sum. Afterward, the heirs of Ash determined to appeal from such decree to the Supreme Court, and at their request the administrator re-deposited such money with the clerk of such court and took his receipt therefor, as set out in the complaint. The decree was reversed in the Supreme Court. While Daggy was supposed to be the owner of such real estate, he sold certain portions of it to divers persons, to whom he made deeds, and who were placed in possession of the parts so purchased. The heirs of Ash commenced another action, to quiet the title to and obtain partition of the lands which Daggy claimed to have purchased. The case was decided in favor of the plaintiffs. From this judgment, Daggy and others appealed to the Supreme Court, where the judgment below was reversed, and the court below was ordered to render a final judgment in favor of Daggy and the persons claiming under him, which was accordingly done. The result of these several suits was that Daggy got the land in controversy. The money deposited by the administrator of Ash with the clerk remained in his possession during the continuance of the litigation. The clerk died with the money in his possession. The money was demanded of the executors of the clerk by the administrator of Ash, and payment being refused, this action was brought to recover the same. The court below rendered judgment in favor of the estate of Ash, from which the executors of McGinnis, the clerk, have appealed to this court and seek a reversal upon several grounds.

It is, in the first place, insisted that the payment of the money into court did not vest the same in Ash.

It is claimed, in the second place, that the administrator of Ash deposited the money with the clerk to abide the event of that suit, and as that particular suit was decided in favor of the heirs of Ash, the money again became the property of Daggy, if he ever lost the title thereto.

It is, in the third place, argued, that if the final determination of the controversy deprived Daggy of any equitable

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interest in the money, the title thereto was vested in the heirs, and not in the administrator of Ash, and that the suit should have been brought by them, and not by him. The fourth position assumed is, that the action is barred by the statute of limitations. The fifth position assumed by counsel for appellants is, that the appellee is estopped from maintaining the action in his representative capacity.

Jacob Daggy had the clear and undoubted right to maintain his action for a specific performance of the executory contract, without making a strict and unconditional tender, and without paying the money into court. It would have been sufficient for him to have tendered the money, upon the condition that a deed was made to him, and upon the refusal to accept the money and perform the contract, he might have brought his action and shown in the complaint such tender and refusal, and that he was ready, able, and prepared to pay whatever sum was found to be due, upon a decree for a specific performance.

The difference between a strict and unconditional tender and a conditional tender is stated with great accuracy and clearness by Mr. Chief Justice SHAW in *Irvin v. Gregory*, 13 Gray, 215, which was an action for specific performance and involved the questions of whether there had been a sufficient tender, and whether such tender should have been kept good by the payment of money into court.

The learned judge said:

"When a strict tender of money is required, it must be an unconditional offer of the full amount due, leaving it only at the will of the other to accept it.

"But when, in their nature, the stipulations are, the one to pay money and the other to execute a conveyance, and no time fixed, and no provision that either is to be done first, the covenants are mutual and dependent. The one is not bound to pay, without receiving his conveyance; nor the other to part with his land, without receiving his money. The performances must be simultaneous. In such case, it is not necessary on the part of the purchaser to make a strict tender, and

actually to deliver over the money unconditionally, without his deed; it is sufficient that upon reasonable notice to the owner he is ready and willing to perform, and when the performance is the payment of the money, that he has the money and is able and prepared to pay, and demands the deed, and the other absolutely refuses to receive the money and execute the deed; that is a sufficient tender of performance to warrant the party so offering to maintain his action. And there may be both dependent and independent stipulations in the same agreement. *Kane v. Hood*, 13 Pick. 281; *Couch v. Ingersoll*, 2 Pick. 292."

The same learned judge, on page 219, says: "When money is brought into court, with a plea of tender, it is an admission of the party bringing it that the adverse party is entitled to it, and may take it out when he pleases. But in a suit for specific performance, it is sufficient for the plaintiff to offer by his bill to bring in his money, whenever the sum is liquidated, and he has a decree for performance."

It was held by this court in *Reed v. Armstrong*, 18 Ind. 446, that "a tender, followed by bringing the money into court, is regarded as a payment at the time, and the person pleading it cannot withdraw the money so deposited, whether the verdict be for the same, or a greater amount than the sum tendered, but the same must be paid to the plaintiff."

The settled rule is, that where a strict and unconditional tender is required, it must be kept good by the actual payment of the money into court for the sole and exclusive use of the party to whom the tender was made. In such case, the tender and payment is an admission, on the part of the party making the tender and paying the money, that the adverse party is entitled to it and may take it out whenever he pleases.

But where the tender is conditional, as in a suit for specific performance, or to have a deed absolute upon its face decreed to be a mortgage, or the like, the payment of the money into court is not an admission that the money so paid into court belongs unconditionally to the adverse party, but it is an

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admission that the money belongs to the adverse party whenever the condition upon which the tender was made, has been complied with by such party, or the court has decreed a performance thereof.

When a strict and unconditional tender has been made and followed by an actual payment into court, the adverse party can take the money without impairing his right to prosecute his action. But when money is tendered on a condition, the party to whom the tender is made is not entitled to the money until there has been a performance of the condition; and where money is conditionally paid into court, the acceptance of the same is an admission that the party so paying the same is entitled to the relief prayed for. A party can not receive money conditionally paid into court while he denies the existence of the contract upon which it is paid; for otherwise, in an action for specific performance, a defendant might take the money and afterward defeat a decree for a specific performance, and thus retain his land and get the purchase-money both, which would be inequitable and unjust. *Sowle v. Holdridge*, 25 Ind. 119.

The ruling in the case of *Irvin v. Gregory*, *supra*, was referred to and followed by this court in *Hunter v. Bales*, 24 Ind. 299.

An examination of the record shows that the money in dispute was deposited with the clerk for Ash, upon the condition that a specific performance of the executory contract was decreed. Ash denied the contract and sought to defeat a specific performance. He refused to receive the money. The court decreed a specific performance. The acceptance of the money by Ash would have been an acknowledgment of the correctness of the decree, but he died without receiving the money. His administrator received the money from the clerk, but afterward re-delivered it to the clerk. The evident purpose of the administrator was to place the money in the same condition that it was in before he received it from the clerk. This action being against the estate of the clerk, and not upon his official bond, it is not

necessary for us to decide whether, when he received the money from the administrator of Ash, it was a payment to him as the private agent of such administrator or in his official capacity. *Sowle v. Holdridge, supra.* The most favorable view for the appellants that can be taken of the transaction is, that the money was re-deposited with the clerk, subject to the same conditions as when originally deposited by Daggy. The judgment in favor of Daggy having been reversed, Daggy would have had the right to have withdrawn the money, but he retained the possession of the land in dispute and left the money in the hands of the clerk. By the subsequent action, it was finally decided that Daggy was entitled to a specific performance, and he obtained a title to the land. As we have seen, he admitted that Ash was entitled to the money, if he got the land. Daggy gained the land, and the money in equity belonged to Ash. It would be a very narrow and illiberal construction of the receipt given by McGinnis to the administrator of Ash to hold the administrator to the recital, that the money was "to abide the event of that suit." Such was not the meaning or purpose of the parties. The true purpose was to place the money in the same condition it was in when deposited by Daggy, and that condition was, that if Daggy gained the land, the money was to belong to Ash, and if Daggy lost the land, he was to have the money. Daggy never claimed the money, and his administrator disclaims all title to the money or interest in the suit. The rights of Daggy are asserted by the executors of McGinnis, who received the money and retain the same without any legal or equitable claim to it. There is neither justice nor equity in the defence.

But it is earnestly insisted by counsel for appellants, that it is fully shown by the receipt given by McGinnis that the money had become the property of the heirs of Ash, and that it was deposited by them. We do not think that instrument can bear any such construction. The following facts are recited therein: 1. That Daggy had instituted a

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suit against Ash and had paid into court \$792.65. 2. That Ash had refused to receive the money, but that it had been taken out by the administrator without the consent of the heirs as was alleged. 3. That the heirs of Ash had appealed the said cause to the Supreme Court and had directed the administrator *de bonis non* to re-deliver the same to the clerk of the Putnam Circuit Court, to abide the event of that suit. 4. That the administrator had deposited for that purpose the sum of \$792.75. The only connection which the heirs of Ash had with the transaction was, that they had appealed the case and directed the administrator to re-deliver the money to the clerk. The administrator had receipted for the money, had it in his possession, and re-delivered it to the clerk. The widow of Ash was entitled to certain portions of the real estate and personal property against the creditors and the heirs, but the heirs were not entitled to any of the estate until the debts were paid. *The Northwestern Conference of Universalists v. Myers*, 36 Ind. 375.

It is alleged in the complaint in the present action, that the estate of Ash is unsettled, and that the money in controversy was needed to pay the debts. We entertain no doubt that the money belongs to the estate of Ash, and not to his heirs, and the action is properly brought by his administrator.

Is the action barred by the statute of limitations? We think it is very clear that it is not. The money having been deposited with McGinnis, no action could be maintained without a demand. The rule is, that the statute of limitations does not operate until the party has the right to apply to the proper tribunal for relief. Sec. 42, Angell Limitations, 34; *Atherton v. Williams*, 19 Ind. 105.

The right of action did not accrue until the demand was made. The suit was brought soon after the demand was made.

It remains to inquire whether the appellee is estopped from asserting that the money in question belongs to the estate of Isaac Ash, deceased.

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We have been unable to discover any of the elements of an estoppel in favor of the appellants. The fact that the clerk paid to Daggy the sum of \$158.55, with the knowledge and consent of the plaintiff, might estop him from recovering the money so paid, but it certainly can not estop him from collecting the balance.

We have discovered an error in the record, of which the appellants can complain, and have seen no equity in the defence set up.

The judgment is affirmed, with costs.

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WILL.—Mortgage.—Election.—Estoppel.—The owner of certain real estate made a will, in which he devised to his wife one-third of such real estate and to one of his sons two-thirds. Afterward, he executed to the same son certain promissory notes and also, to secure them, a mortgage on the whole of the land previously devised. The mortgagor afterward died, leaving the widow, the said son, and also a number of other heirs-at-law him surviving, said will being unrevoked and said mortgage being in force and unsatisfied. Afterward, the son in whose favor the will and mortgage had been made commenced a suit to foreclose the mortgage, making defendants the widow and other children and grandchildren of the deceased mortgagor, in his complaint alleging that the defendants were "heirs" of said deceased mortgagor; which proceeding to foreclose was dismissed by the plaintiff.

Held, that the doctrine of election did not apply; that his attempt to foreclose the mortgage, he being also a devisee of the same land, was not an election to claim under the mortgage or a waiver or relinquishment of any right he might have had under the will.

Held, also, that such attempt did not constitute an estoppel. It is only where the point in issue has been determined that the judgment is a bar. If the suit is discontinued, or the plaintiff becomes nonsuited, or for any other cause there has been no judgment of the court upon the matter in issue, the proceedings are not conclusive. The mere fact of bringing the suit to foreclose the mortgage, the complaint alleging that the defendants were "heirs" of the

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mortgagor and seeking to foreclose their equity of redemption, the suit having been dismissed, did not estop the devisee from asserting his claim under the will; nor did the fact that expenses were paid by the defendants to such suit of foreclosure in defending the same create an estoppel.

From the Tippecanoe Common pleas.

Jones, Miller & Stallard, Wallace & Hiatt, and C. A. Ray,
for appellants.

W. D. Lee and P. H. Lee, for appellees.

DOWNEY, C. J.—This was a petition for the partition of certain real estate described in the petition, filed by the appellees against the appellants. There was an answer and a reply, trial by the court, and judgment for partition; and the court, having found that the land could not be divided, ordered it sold, and appointed a commissioner to make the sale. From this judgment the appeal was taken. No objection is made that the appeal was taken prematurely. It appears that on the 16th day of June, 1855, Stephen Winship was the owner of the land in fee simple, and on that day made a will, by which he devised to his wife, the said Rebecca Winship, one-third of the land, in case she should survive him, and the other two-thirds he devised to his son, Charles Winship. There was a clause in the will by virtue of which Charles was to have the one-third devised to his mother in case she died before his father. The deceased had a personal estate, but it is not material to notice that fact more particularly.

On the 23d day of February, 1857, Stephen Winship executed to his said son Charles two promissory notes for the aggregate sum of nine hundred and eighty-six dollars; and on the 26th day of the same month he executed to said Charles a mortgage on all of the real estate in question, in which his wife did not join, to secure the payment of the said notes.

Stephen Winship departed this life in 1862, and afterward, in July, 1862, the said will was duly probated and admitted to record.

In February, 1863, Charles Winship commenced an

action in the Tippecanoe Circuit Court, to foreclose the said mortgage, making defendants thereto the widow, the children, and the children of deceased children of said deceased, and the administrator with the will annexed of his estate, styling the widow, children, and children of deceased children, "heirs" of the deceased, and asking the foreclosure of their equity of redemption. Rebecca Winship, the widow, Amanda Gaddis, a daughter, with her husband, and the administrator with the will annexed answered the complaint, disputing, in part, the consideration of said notes, in some of the paragraphs, and denying entirely any consideration in another. Demurrers to some of the paragraphs were filed and overruled, and replies were filed, when at the April term, 1863, the action was dismissed by the plaintiff.

In May, 1869, the appellees filed their petition in this case for partition of the land. The petitioners were Mary Ann Winship, Lilly Winship, William Winship, James Winship, Solomon Gaddis, William H. Gaddis, Virginia Gaddis, Stephen W. Gaskill, Sarah E. Gaskill, Elizabeth Winship, Amelia Kundler, George W. Kundler, and Loretta Gaddis. The defendants were Rebecca Winship, the widow, Charles Winship, and Edward Winship.

The defendants answered, setting up that Rebecca Winship and Charles Winship were the exclusive owners of the land by virtue of the will of said deceased, setting it out.

The petitioners replied : 1. That the plaintiffs and defendants are the heirs of Stephen Winship, deceased, whose will is set forth in the defendants' answer; that said Charles Winship, one of the defendants to this action and devisee in said will, after the decease of said Stephen Winship, on, etc., with full knowledge of the terms of said will, and all of his rights in connection therewith, commenced an action against the heirs of said deceased, Stephen Winship, among whom were these plaintiffs, in the Tippecanoe Circuit Court, etc., to foreclose a mortgage executed by the said Stephen Winship in his lifetime to said defendant Charles Winship; that said Charles Winship therein alleged that these plain-

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tiffs were heirs of the said deceased, and asked that their equity of redemption as such might be foreclosed; that the plaintiffs acted upon said admission; that they employed counsel and appeared and defended against said foreclosure; that they were put to great cost and trouble thereby; that said Charles Winship had full knowledge of the making of said will, and the circumstances and influences attending the same; that no other heir had any knowledge of the existence of said will until after the death of said Stephen, and the same was published by the defendant Charles. They further say that said Charles has never had possession of said land or attempted to assert any right thereto by virtue of said will, as against the plaintiffs, but the same has been treated and regarded by the plaintiffs, as admitted in the complaint of the said defendant Charles, as the joint property of the defendants and plaintiffs, as heirs of the said Stephen Winship, deceased; wherefore said Charles is estopped from asserting any title under said will. In a second paragraph of the reply, they say that the matters and things set forth in the foregoing paragraph are true and made a part of this paragraph, and further say that afterward, to wit, on the 28th day of March, 1865, the defendants entered into a contract adjusting their claims to the estate of said Stephen Winship, deceased, and that said Charles therein conveyed and quitclaimed to Edward Winship, son of said Stephen and brother of said plaintiffs, a certain part of said land on account of his heirship as son of said Stephen; a copy of the deed is made part of the paragraph; wherefore, etc. The instrument referred to in this paragraph is dated May 28th, 1865, and it is between Rebecca Winship, the widow, of the first part, Charles Winship, son and devisee of said deceased, of the second part, and Edward Winship, son and distributee of the decedent, of the third part. It recites that the parties had that day settled and adjusted all their claims to the estate, both real and personal; that Edward had advanced sixty-five dollars to the administrator to pay costs and

charges thereof; and in consideration of the premises and for the purpose aforesaid, and to have partition of said real estate, said Rebecca conveyed and quitclaimed to Charles a part of the real estate; and Charles and his wife, in consideration of the premises, and for the purposes aforesaid, and to have partition of said real estate, conveyed and quitclaimed to Rebecca and Edward a certain other part, as tenants in common, two-thirds to her and one-third to him; and they mutually agreed that none of them would make any claim against the estate or the administrator, for any property inventoried or sold by him.

Separate demurrers to each paragraph of the reply were filed, on the ground that they did not state facts sufficient to constitute a reply to the answer; which were each overruled by the court, and the questions were reserved by exception.

There was a trial by the court and a finding, among other things, that the deceased, by his last will and testament devised to the defendant Charles Winship the undivided two-thirds of the real estate in question, but that he was estopped to set up any claim or title thereto under the will. The defendants moved the court for a new trial, for the reason, among others, that the finding of the court was not sustained by the evidence. This motion was overruled, and there was judgment for partition, by which it was ordered that one-third of the land be set off to the widow; to Charles Winship, Edward Winship, and Sarah Gaskill, one-ninth; to Mary Ann Winship and Solomon Gaddis, each one-twenty-seventh; to Lilly Winship, William Winship, and Jane Winship, William H. Gaddis, Loretta Gaddis, and Virginia Gaddis, each one undivided two-eighthys thereof; and to Elizabeth Winship and Aurelia Kundler, each one-eighteenth thereof.

The errors assigned in this court are: 1. Overruling the defendants' demurrer to the first paragraph of the reply. 2. Overruling the demurrer to the second paragraph of the reply. And, 3. Overruling the defendants' motion for a new trial.

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The first position assumed by counsel for the appellees is, that although by the will of the deceased, Charles Winship became the owner in fee simple of two-thirds of the real estate of his father, yet, by his attempt to foreclose the mortgage executed after the date of the will by his father, he elected to claim under the mortgage, and thereby waived or relinquished any right or estate which he would otherwise have had under the will.

It is evident, we think, that this is not a case to which the doctrine of election, in any view of it, can be applied. It is not a case where the party claims under a will which contains two inconsistent or alternative provisions in his favor out of the estate of the deviser, in which case, under most circumstances, the devisee or legatee will be put to his election. Here the interest or estate of Charles under the mortgage was wholly distinct and separate in its origin and derivation from the estate which he took under and by virtue of the will. The testator, moreover, could not have intended that the devise should be in lieu or in satisfaction of the mortgage, for the will was made before the mortgage was executed. The execution of the mortgage, clearly, did not operate as a revocation of the will which had been previously made. Most cases of election are those where the testator leaves a portion of his property to A., for instance, and by the same will disposes of property belonging to A. Here the double disposition made by the testator implies that he did not intend that A. should have both the interests, and he must, therefore, elect between the two, and either relinquish his own property or compensate the disappointed donee out of the property bequeathed. Thus it will be seen that two things are essential to originate and require such election; first, that the testator shall give property of his own, and, second, that he shall profess to give also the property of his donee. It is clear from this statement that the case in hand does not come within the doctrine relating to this kind of election.

But although the doctrine of election is discussed, to some

extent by counsel for the appellees, we do not understand them as putting their case fully upon that ground. We understand that they put the case, so far as the sufficiency of the first paragraph of the reply is concerned, upon the ground of estoppel, and that was the ground on which the case seems to have been decided in the common pleas. It is put on the ground that by bringing the action to foreclose the mortgage, styling the plaintiffs herein in his complaint as heirs of the deceased, and asking to foreclose their equity of redemption, connected with the fact that they acted upon the admission of an interest in them, thus made, and employed counsel and expended money on the faith of its truth, their claim was conclusively admitted, and that it would now be an injury to them to allow the admission to be withdrawn, by causing them to lose their time and money expended, and would result in a loss to them of the estate, and that therefore the said Charles is estopped to set up his estate under the will.

What is the effect of the commencement of the suit to foreclose the mortgage, the recitals or allegations in the complaint stating that the plaintiffs were heirs of Stephen Winship, seeking to foreclose their equity of redemption in the land, and the dismissal of the action, without the allegation of the making of expenditures of money and time in the defence of that action?

It is only where the point in issue has been determined, that the judgment is a bar. If the suit is discontinued, or the plaintiff becomes nonsuited, or for any other cause there has been no judgment of the court upon the matter in issue, the proceedings are not conclusive. 1 Greenl. Ev., sec. 529; 2 Smith Lead. Cas. 826; *Boileau v. Rutlin*, 2 Exch. 664; *Holt v. Miers*, 9 Car. & P. 191; *Smith v. Harrell*, 16 La. An. 190. In *Werkheiser v. Werkheiser*, 3 Rawle, 326, the plaintiff had presented a petition to the Orphan's Court, setting forth that his father died seized of the premises therein described, leaving a widow and seven children, and praying the court to award an inquest to make

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partition, etc., and it was held by the court, that this did not estop him from afterward maintaining an ejectment for the same premises and proving that they were the estate of his mother, who was his father's first wife, and descended to him as her heir, to the exclusion of his brothers and sisters, the children of the second wife. The court said in this case: "If a man institute a suit, and has made an error in declaring, or in the parties to the action, he may discontinue it, and proceed in such other form as the nature of his case may require, without being estopped, even though the second suit be founded upon a cause of action different from the former, and denying the allegations in the first declaration."

In *Miller v. Baker*, 1 Met. 27, it was held that where a party had, at the first trial of a cause, set up a conveyance as a mortgage, and it was decided that the conveyance was absolute, he was not estopped to rely on it as absolute at a second trial.

Where a tenant of land presented a petition to the legislature, admitting that the land belonged to the commonwealth, and praying that it might be granted to him, and thereupon the land, by the authority of the legislature, was sold to another person, it was held that the tenant was not estopped from setting up his title, and that such act was only to be regarded as an admission which could be explained or disputed. *Owen v. Bartholomew*, 9 Pick. 520. In view of these authorities, we are of the opinion that the mere fact of bringing the suit to foreclose the mortgage, the complaint alleging that the plaintiffs were heirs of Stephen Winship, and seeking to foreclose their equity of redemption, and the suit having been afterward dismissed, does not estop Charles Winship from asserting his claim under the will. Does the additional allegation in the paragraph, that the plaintiffs employed counsel, appeared to the action, and expended money and time in the defence of it, make the paragraph good? We are of the opinion that it does not. If the incurring of expense in such a case can, under any circumstances, render the allegations of the pleading conclusive, the

pleading relying on it should state what amount was expended and for what purpose, so that the court might know that the amount paid was sufficient to give character to the transaction, and that it was paid for a purpose legitimately connected with the litigation. There is no intimation, however, in any of the authorities which we have examined, that the payment of the expenses of defending an action can be relied upon to give to the allegations of the complaint in the action, after the dismissal of the suit, the character of an estoppel. In this case, the plaintiffs knew of the existence of the will, and that they were heirs of Stephen Winship, when they made the alleged expenditures, as well as Charles Winship did. He made no representations to them upon the faith of which they expended money, unless it was the implied representation that they had an equity of redemption in the land. By this we think he was not concluded, for the reasons which we have already stated.

The record filed with the reply does not sustain it. The reply alleges that the plaintiffs employed counsel, appeared, and defended the action to foreclose the mortgage. The record shows that only the widow, who is not a plaintiff, Amanda Gaddis, who is dead and not a plaintiff, and the administrator, who is not a plaintiff, appeared and defended the action. In our opinion the paragraph in question is bad, and the demurrer to it should have been sustained.

The second paragraph of the reply is clearly defective. So far as the pleader refers to the preceding paragraph and attempts to incorporate it into the second, he violates a well established rule of pleading, which requires that each paragraph of a pleading must be sufficient of itself, without reference to those which precede or follow it, and must stand or fall upon its own merits. We cannot therefore regard this part of the paragraph as giving any support to the other part. The making of the conveyances to which the paragraph refers cannot possibly be regarded as creating any estoppel in favor of the plaintiffs. They were not parties to the transactions at all, nor do they claim as being in privity

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with any of them. It is simply alleged that Charles conveyed by quitclaim deed to Edward, a brother, on account of his heirship, as son of the deceased, a certain part of the real estate. It appears from the instrument, a copy of which is filed, that Edward was to pay a sum of money to the administrator, etc. We think that Charles had a right to compromise with Edward, as it is alleged he did, without, by that act, creating a right in the other children and the grandchildren to claim an equal or greater or any share of the estate. They are not content with the terms conceded to Charles, but insist upon a full share of the estate unconditionally. It is said in *Simpson v. Pearson*, 31 Ind. 1, that it is a well settled rule in such cases that no man can set up another's act or declaration as the ground of an estoppel, unless he has himself been misled or deceived by such act or declaration.

The evidence fails to show the expenditure of any money by any of the plaintiffs in the defence of the foreclosure suit. We need not, however, consider the questions which are presented by the assignment of error, relating to the overruling of the motion for a new trial.

The judgment is reversed, with costs, and the cause remanded, with instructions to sustain the demurrers to the paragraphs of the reply.

THE SKELTON CREEK DRAINING COMPANY v. MAUCK.

DRAINING ASSOCIATION.—*Articles of Association.*—The law authorizing the organization of associations for the purpose of draining wet lands (Acts Special Session 1869, p. 82, 3 Ind. Stat. 222) contemplated that the mode and manner of draining should be described and particularly specified in the articles of association of a draining company; and without this they are fatally

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defective, and any assessment made thereunder upon lands for benefits thereto is illegal, and the collection may be enjoined.

From the Gibson Circuit Court.

D. F. Embree and *O. M. Welborn*, for appellant.

C. A. Buskirk, for appellee.

OSBORN, J.—This was an action by the appellee against the appellant. It was instituted for the purpose of setting aside an alleged illegal assessment made upon certain lands owned by him, for benefits thereto by the contemplated work of the appellant.

The articles of association of the company are as follows:

“Know all men by these presents, that we, Benjamin F. Skelton, who is the owner of the s. w. $\frac{1}{4}$ s. w. $\frac{1}{4}$, sec. 17, T. 2 s., R. 11 w., and s. w. $\frac{1}{4}$ s. e. $\frac{1}{4}$, sec. 18, T. 2 s., R. 11 w., Sidney M. Woods, who is the owner of the n. e. $\frac{1}{4}$ of s. e. $\frac{1}{4}$ of sec. 18, T. 2 s., R. 11 w., and adjacent lands, Alexander H. Polk, who is the owner of the north half of sec. 17, T. 2 s., R. 11 w., William Bradham, who is the owner of an undivided interest in the w. $\frac{1}{2}$ of n. e. $\frac{1}{4}$, sec. 9, T. 2 s., R. 11 w., Alfred Mauck, who is the owner of the east $\frac{1}{2}$ n. w. $\frac{1}{4}$, sec. 19, T. 2 s., R. 11 w., and others undersigned, owning lands wet or liable to be overflowed, and supposed to be liable to be affected by the work herein contemplated, do hereby associate and organize into a company and corporation, under and by the name of The Skelton Creek Draining Company, for the purpose and object of draining, reclaiming, and protecting the lands hereinbefore mentioned, described, and referred to, and other lands in the vicinity thereof, wet or liable to be overflowed. In testimony whereof we have hereunto set our hands, this 12th day of May, 1870.”

They were signed by B. F. Skelton, S. M. Woods, A. H. Polk, Wm. Bradham, W. H. Stewart, Ander Lewis, Thomas Cole, and Edward E. Jones, dated May 12th, 1870, and recorded in the miscellaneous records of the county, on

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the 21st of the same month. Alfred Mauck did not sign the articles.

It is alleged in the complaint that the appellee is the owner of the tract of land described in the articles of association as owned by Alfred Mauck; that the appellant claims to be and is acting as a corporation, organized under the draining law of May 22d, 1869, by virtue of certain articles, being the same as are above set out, which the complaint alleged had been duly recorded in the office of the recorder of Gibson county, and that he is not a member of the association; that the appellant procured the appointment by the judge of the court of common pleas of that county of certain persons named as appraisers, to appraise the benefits received and damages sustained by reason of the contemplated work of the company; that the appellant caused notice to be given by publication in a newspaper of the county, that appraisers duly appointed would, on a day named, meet and proceed to make the assessments; that the assessments were made and filed in the recorder's office; that the appraisers assessed as benefits to his land described in the complaint one hundred dollars upon one forty-acre tract, and twenty-five dollars upon the other; that the contemplated work does not pass through his land, or nearer than a quarter of a mile thereof; that the appellant pretends that it has a lien upon his land for the amount of the assessments, and has demanded payment of the same, and threatens to collect it by legal proceedings. It also avers that no other articles of association were ever made by the appellant, no other notice of the time and place of the meeting of the appraisers was ever given, and no other specifications or description were ever made, than are set out in the complaint; that the assessment assumes to create a lien upon his land and creates a cloud upon the title and prevents its sale.

Prayer, that the assessment may be declared illegal and void, that it may be set aside, and for an injunction restraining its collection, and for general relief.

A demurrer was filed to the complaint, on the ground that

it did not contain facts sufficient to constitute a cause of action, and overruled. After that, the appellant filed a motion to strike out parts of the complaint, which was also overruled. An answer was then filed, to which the appellee filed a demurrer, which was sustained. The appellant, refusing to answer further, the allegations of the complaint were taken as true *pro confesso*, and judgment rendered declaring the assessment void, and enjoining the appellant from asserting any rights or claim thereby against the land, and for costs. Proper exceptions were taken to the several rulings and final judgment of the court. A bill of exceptions shows what was included in the motion to strike out.

The errors assigned are:

1st. In overruling the demurrer to the complaint.

2d. In overruling the motion to strike out portions of the complaint.

3d. In sustaining the demurrer to the answer.

4th. In making the decree and judgment.

The law authorizing the organization of associations for the purpose of draining wet lands (Acts of Special Session, 1869, p. 82, 3 Ind. Stat. 222) contemplated that the mode and manner of draining should be described and particularly specified in the articles. *West v. The Bullskin Prairie Ditching Company*, 32 Ind. 138; *O'Reiley v. The Kankakee Valley Draining Co.*, 32 Ind. 169. In those cases, an attempt had been made to describe the drain. In the one first named, the court said: "The description of the drain in the case before us is so defective as to be wholly useless for every purpose for which the law requires such a description. It is impossible to determine from it whether one or two drains were intended, or what lands would be affected by it." In the other, the articles were held to be fatally defective for the want of a sufficient description of the work. In addition to the reasons given in those cases, it seems to us that without such a description and particular specification of the work, the appraisers would have no basis upon which to act in making the examination of the lands liable to be

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affected by the construction of the proposed work, and assessing the benefits and injuries to such lands, as provided in sec. 6 of the act.

As will be seen by an examination of the articles of association, heretofore set out, they described no work. The organization is for the purpose of draining, etc., the land. How it is proposed to do it is not stated. The appraisers could make no intelligent assessment of benefits or injuries on account of any work proposed, when none was authorized or provided for in the articles of association.

We think the complaint would have been good, if the motion to strike out parts of it had been sustained. The appellant was not prejudiced by overruling his motion.

The following is the answer filed by the appellant, to which a demurrer was sustained:

“The defendant, for answer to plaintiff’s amended complaint, admits that she assumes to be, and alleges that she is, a corporation organized under the law in said complaint mentioned, and admits that her articles of association, her notice of the meeting of appraisers, and the report of the assessment of appraisers, are correctly set forth in said complaint, and admits that said articles of association and assessment were recorded as in said complaint alleged; and defendant avers that due notice of the recording of said assessment of benefits and damages was given by defendant as required by law, and avers that the work of defendant is a work of public utility, and further avers that the lands of the plaintiff described in his complaint, whereon he alleges defendant claims to have a lien, is the same land described in defendant’s articles of association, as belonging to Alfred Mauck, whereby plaintiff had full notice of the manner in which the work of defendant would affect said land; wherefore defendant prays judgment for costs.”

It is clearly bad. It does not deny the allegation of the complaint, that the proceedings of the appellant, in causing the assessments to be made, were based entirely upon the articles of association set out in the complaint. On the

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contrary, it expressly admits that she was organized under the law as stated in the complaint, and that her articles of association are therein correctly set forth.

The judgment is affirmed, with costs.

PETERS ET AL. v. RADER.

EVIDENCE.—Contradiction.—Although there be contradiction and uncertainty in the evidence, if it reasonably sustain the finding of the court below, this court will not disturb such finding.

From the Boone Circuit Court.

A. J. Boone and R. W. Harrison, for appellants.

PETTIT, J.—This suit was brought by William Rader against John S. Peters and Philip Buck. There was a verdict and judgment for Buck, and he does not appeal and is not in the case here, but the case is properly in this court as *Peters v. Rader*. The action was for wood sold and delivered, and this is the bill of particulars filed with the complaint.

“Bill of particulars.

“WHITESTOWN, June 22d, 1870.

“Buck & Peters to William Rader Dr.

To 340 cords wood at \$2.00 and \$1.75	\$666.05
Interest on same	8.95
	<hr/>
	\$675.00”

The answer was in two paragraphs; the first was stricken out on motion, and no objection or exception was taken to this ruling; hence we can take no further notice of it. The second was the general denial. There was a verdict against Peters, and he moved for a new trial for the causes: “1st. Because the verdict of the jury is contrary to law. 2d. Because the verdict is contrary to the evidence.” This

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motion was overruled, exception taken, and this ruling is assigned for error.

We have all examined the evidence, and think the jury might well have found the verdict as they did. It is true that there are contradiction and uncertainty in the evidence, but we think it reasonably sustains the finding. The facts that the wood was delivered near a railroad track, and that its agent measured it to appellant Peters, in his presence; that he took the note of the railroad company, payable to himself, for the wood; that the plaintiff had made a large bill in the store of appellant on the faith of the wood; that his clerk in the store, when appellant was present, made out and gave to appellee a statement of the amount the wood came to, and of the amount of his bill in the store, showing the balance due to the appellee; and that the appellant paid five dollars and seventy cents in cash on it, taken in connection with all the other evidence, might reasonably lead the jury to believe that the wood was sold by the appellee to the appellant.

The judgment is affirmed, at the costs of the appellant Peters.

HORNADAY v. THE STATE.

LIQUOR LAW.—License.—Under the act of 1859, it was not requisite that any other person than the applicant should sign his petition for a license to retail intoxicating liquors.

JURISDICTION.—Judgment of Inferior Court.—Where the jurisdiction of an inferior court depends upon a fact which such court is required to ascertain and settle by its decision, such decision is conclusive, except in a direct proceeding to reverse or set aside the judgment.

SAME.—Liquor Law.—The question of whether proper notice by publication had been given by an applicant for license under the liquor law of 1859 could not be inquired into in a prosecution against such person for retailing intoxicating liquor without a license.

From the Marion Criminal Circuit Court.

B. F. Davis, for appellant.

J. C. Denny, Attorney General, and *B. K. Elliott*, for the State.

BUSKIRK, J.—The appellant was indicted for retailing spirituous liquors without a license. The issue formed by the plea of not guilty was submitted to the court for trial and resulted in a finding against the appellant. The court, having overruled a motion for a new trial, rendered judgment on the finding.

The error assigned is the overruling of the motion for a new trial.

The principal error relied upon for the reversal of the judgment is the admission of illegal and incompetent evidence on the trial. The cause was tried upon admissions made by the parties, except upon one question, upon which evidence was admitted over the objection and exception of the appellant. The following admissions were made as appears from the bill of exceptions: "And thereupon the defendant admits that he did, on the 12th day of March, 1873, at the time and place named in the indictment, at and in his place of business on lot No. three (3), in the town of Hasbrook, in Marion county, Indiana, sell to Lewis C. Trisler, named in the indictment, one gill of intoxicating liquors, for the price and sum of ten cents, and that the same was then and there drank upon his said premises; and upon said admission, the State closes her evidence in chief.

"And thereupon the State admits that upon the 5th of February, 1873, the defendant did obtain a license to sell intoxicating liquors in less quantities than one quart at a time, at and in his said place of business, on lot No. three (3) in Hasbrook (the same known as Augusta Station), where said liquors were sold and drank, for the period of one year; that upon the order being made by said commissioners' court, of Marion County, Indiana, and upon said day, he executed his proper bond and paid to the treasurer for his license the sum of fifty dollars, and thereupon took and received from the treasurer of said county a receipt therefor, which he delivered to the auditor of said county, and then

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and there received his license to so sell intoxicating liquors in less quantities than a quart at a time, at the place where the sale was made and previous thereto, and here the defendant rests."

The State then offered to read in evidence the notice of publication for said license, published in English, in the *Volksblatt*, a weekly newspaper published at and in the city of Indianapolis, county of Marion, and State of Indiana, to the introduction of which testimony the defendant at the time objected, on the ground that said testimony was irrelevant and immaterial, and that the sufficiency of the notice had been determined by the commissioners' court of Marion county, upon the hearing of his application for license, and which determination is unappealed from and in force, which objections the court overruled, and the defendant thereupon excepted; and upon the announcement of such decision of the court, the defendant admitted that said publication was made in English, in said paper, and in no other way did the defendant give notice of his said application for license, and that said paper was, at the time, a weekly German newspaper, printed at Indianapolis, Indiana, and printed in the German language, when and where six or more weekly newspapers, of general circulation, were published in the English language, in said county.

The State was also permitted, over the objection and exception of the appellant, to prove the number of German families residing in Pike township, where the appellant carried on business, that the *Volksblatt* was not taken by any person in said township, and that a number of the persons who had signed the petition for such license did not reside in Pike township, but in the city of Indianapolis, and that the appellant obtained such signatures with full knowledge that such persons were not citizens and residents of said Pike township.

It is insisted, by counsel for appellee, that the evidence was properly admitted, for the purpose of showing that the board

of commissioners had acquired no jurisdiction of the application for a license.

On the other hand, it is contended, by counsel for the appellant, that the board of commissioners were required to and actually did pass upon the question of whether the proper notice had been given, and that the finding upon that question is conclusive, except upon appeal to the circuit or common pleas court.

In the case of *Rhodes v. Piper*, 40 Ind. 369, we considered and passed upon the question of the conclusiveness of the finding of a fact which was essential to evoke the exercise of jurisdiction; and we held that when the jurisdiction of an inferior court depends upon a fact which such court is required to ascertain and settle by its decision, such decision is conclusive, except on a direct proceeding to reverse or set aside the judgment; but we further held that the finding of the fact must be necessary, at the time it is so found, to evoke the exercise of jurisdiction, and if it is not so found it cannot estop those who are affected by such order from denying the existence of such fact. It is the finding of the fact which renders the decision conclusive.

In that case, the leading decisions of this court upon the point under consideration were fully considered, and we do not deem it necessary to re-examine them or add to what was then said. The decision in that case is decisive of the question under consideration. The appellant made proof before the board of commissioners that he had given notice of his intended application for license, and it was held that such notice was sufficient. Those affected might have appealed to the circuit or common pleas courts, or they might have instituted a direct proceeding to set aside the order granting the license, but neither of these things was done, and the conclusiveness of such decision cannot be called in question in an action like this.

Nor can the admission of the proof, that a portion of the persons who signed the petition for the license did not reside in Pike township, for the plain and obvious reason, that

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under the act of 1859, it was not necessary that the petition or application for a license should be signed by any person but the applicant.

Upon the admissions made, the appellant should have been acquitted. The other evidence being inadmissible, the court erred in overruling the motion for a new trial.

The judgment is reversed, with costs; and the cause is remanded, for a new trial in accordance with this opinion.

FRAIZER v. HASSEY ET AL.

WILL.—Life Estate.—A will contained the following clause: "To my wife, Rachel, * * * I will and bequeath the eighty acres whereon the house and barn and most of the improvements are of the home place, and which, together with the home place, during her natural life to her, and dispose of the same as she may think best for the interest and comfort of herself and my children." After the death of the testator, the widow sold and conveyed by quitclaim deed the real estate described in the will.

Held, that the widow and her vendee took an estate only for the life of the widow.

From the Fayette Common Pleas.

B. F. Claypool, W. Morrow, and N. Trusler, for appellant.

J. C. McIntosh, for appellees.

WORDEN, J.—Proceedings in partition. John Fraizer, deceased, made his will containing the following clause:

"First. To my wife, Rachel, who owns in her own right one hundred and twenty acres of this my home place, I will and bequeath the eighty acres whereon the house and barn and most of the improvements are of the home place, and which together with the home place, during her natural life to her, and dispose of the same as she may think best for the interest and comfort of herself and my children."

There is no other part of the will that seems to throw any light upon the construction of the clause above set out. After the death of John Fraizer, his widow, Rachel, executed the following deed :

“ This indenture witnesseth, that Rachel Fraizer, of Fayette county, in the State of Indiana, quitclaims to Samuel Fraizer, of Fayette county, in the State of Indiana, for the sum of twenty-eight hundred dollars (\$2,800), the following real estate situated in Fayette county, in the State of Indiana, to wit: The west half of the south-east quarter of section six, township fifteen, in range twelve. In witness whereof,” etc.

It is admitted that the land mentioned in the will as “ eighty acres ” is the same land as that described in the deed ; and the only question presented by the record is, whether Samuel Fraizer, by virtue of the will and the deed, took an estate for the life of Rachel Fraizer, or an estate in fee.

The court below held that he took an estate only for the life of Rachel, and we are of the same opinion.

It is clear to our minds that by the terms of the will Rachel only took an estate for life, as it was expressly limited to her “ during her natural life.”

Whether or not the clause in the will authorizing her to dispose of the land as she might think best for the interest and comfort of herself and the testator's children should be construed to vest in her a power to dispose of the fee, is a question which we need not determine. She took a life estate, and only a life estate, in the premises ; and conceding that the will gave her power to alienate the fee, the question arises whether she has done so.

The deed which she executed to Samuel Fraizer is a mere quitclaim deed, purporting to convey to him such an estate only as she had in the premises. There is nothing in the deed that indicates any intention on her part to convey anything more than the estate vested in her, or to show that she had in view the supposed power to con-

Thompson *et al.* v. Sweetser *et al.*

vey the fee. She had an estate which she could convey, and in view of this fact the following observations of Chancellor KENT are strictly applicable to the case:

"The general rule of construction, both as to deeds and wills, is, that if there be an interest and a power existing together in the same person, over the same subject, and an act be done without a particular reference to the power, it will be applied to the interest, and not to the power. If there be any legal interest on which the deed can attach, it will not execute a power. If an act will work two ways, the one by an interest and the other by a power, and the act be indifferent, the law will attribute it to the interest and not to the authority." 4 Kent Com. 334.

The judgment below is affirmed, with costs.

THOMPSON ET AL. v. SWEETSER ET AL.

PLEADING.—*Replevin*.—In an action to recover the possession of personal property, the general denial is a good answer. Property in the defendant and another is also good, but unnecessary when the general denial is in.

SAME.—*Property in Stranger*.—*Parties*.—*Arrest of Judgment*.—In an action to recover possession of personal property, where property in a stranger is pleaded, or where the evidence shows property in a stranger, it is not necessary that such person should be a party to the action, nor is the failure to make such person a party ground for arrest of judgment.

From the Grant Common Pleas.

A. Steele and R. T. St. John, for appellants.

I. Van Devanter, J. F. McDowell, J. Brownlee, and H. Brownlee, for appellees.

DOWNEY, C. J.—The appellants sued the appellees to recover the possession of certain flax seed. The defendant Sweetser answered separately:

1. A general denial.

2. That the property in question was not the property of the plaintiff, but was the property of James Sweetser and John N. Turner. Horton, the other defendant, answered that he had no interest in the property mentioned in the complaint. There was a reply in denial of the second paragraph of the answer of Sweetser. The issues were tried by the court, and there was a finding for the defendant Sweetser, and that he was the owner and entitled to the possession of the property.

Motions by the plaintiffs for a new trial and in arrest of judgment were overruled, and there was judgment on the finding. The errors assigned are the overruling of the motion for a new trial, and that in arrest of judgment.

The ground relied upon for a new trial was, that the evidence was not sufficient to justify the finding of the court. The appellants claim that one Swope and the appellee Sweetser were partners, and they claim the seed by virtue of a sale made to them by Swope. Sweetser, on the contrary, claims that the seed was his individual property. These different views of the case were embraced in the issues tried by the court, and the evidence in the record seems to have been given by each party with the view of sustaining his theory of the case. We have examined the evidence carefully, and we cannot say that there was such a want of evidence to sustain the finding of the court as to justify us in disturbing the judgment.

The reasons given in the motion in arrest of judgment are, first, that there was no sufficient answer on file; second, that the testimony shows that John N. Turner was a partner of Sweetser, and has not been made a party, etc.; and, third, that Turner should have been made a party, and no judgment can be rendered upon such a record.

There is nothing in the first objection relating to the insufficiency of the answer.

The general denial is regarded as a good answer. Property in the defendant and another is also a good answer, though unnecessary when the general denial is in. *Davis*

 Maher v. Martin.

v. *Warfield*, 38 Ind. 461; *Kennedy v. Shaw*, 38 Ind. 474. It cannot be material that Turner was not a party, for two reasons; first, a plea of property in a stranger means that the ownership of the property is in some one who is not a party to the action. When such a plea is pleaded, or when the evidence shows property in a stranger to the action, it is not necessary that such person shall be made a party to the suit; nor is it any ground for arrest of judgment that such person is not a party to the action; and, second, the finding of the court shows that Sweetser was the owner of the property, and not Sweetser and Turner.

The judgment is affirmed, with costs.

43	314
198	477

43	314
147	421

43	314
152	375

 MAHER v. MARTIN.

MARRIED WOMAN.—Contract.—Where money is loaned to a married woman, her contract to repay it is not voidable merely, but absolutely void; and a promise made by her after the death of her husband to repay it is incapable of having vitality or binding force given to it, without some new and valuable consideration being given.

507

From the Clark Common Pleas.

J. B. Meriwether, for appellant.

PETTIT, J.—Martin sued Maher before a justice of the peace to recover for money loaned. The case was appealed to the common pleas, where it was tried by the court with a finding for the plaintiff. Motion for a new trial, for the reasons, "that the finding of the court herein is not sustained by the evidence, and is contrary to law." This motion was overruled, exception taken, and judgment on the finding. Overruling this motion is assigned for error. The evidence shows (and there is no conflict on this point), that at the

McDill v. Gunn et al.

time the money was loaned, the defendant below, appellant here, was a married woman, and that the money was loaned in the presence of and counted by her husband and then handed to and by her put into a pocket book and placed in a bureau drawer. If this was a loaning to her, it did not and could not create any legal liability on her; she being a married woman, her contract was not voidable merely, but absolutely void and incapable, without some new and valuable consideration being given, of having vitality or binding force given to it by promises to pay made by her after the death of her husband, which event happened about two years after the money was loaned.

This ruling is fully sustained by *O'Daily v. Morris*, 31 Ind. 111; *Wiggins v. Keizer*, 6 Ind. 252; *Eakin v. Fenton*, 15 Ind. 59; Chit. Con. 46, 47, 48, 49; 2 Kent Com. 465; 1 Parsons Con. 434.

The judgment is reversed, at the costs of the appellee.

McDILL v. GUNN ET AL.

EVIDENCE.—Objection to.—Motion for New Trial.—On appeal, in order to raise the question of the admission of improper evidence, the attention of the court below must have been called to the improper evidence, and it is necessary to point it out in the motion for a new trial.

SAME.—Parol Evidence.—Vendor and Purchaser.—Parol evidence may be given to show the real consideration of a deed of conveyance of real estate, and that the purchaser took the conveyance subject to incumbrances and agreed to discharge them in addition to the consideration stated in the deed.

NEW TRIAL.—Motion.—Demurrer.—Error in overruling or sustaining a demurrer is not a ground for a new trial.

VENDOR AND PURCHASER.—Incumbrances.—Consideration.—The parol agreement of a vendee of mortgaged land to pay off the mortgage, as part consideration of the purchase, is valid. It is not within the statute of frauds, and need not be in writing, and may be proved by parol. It is an agreement to

43	315
124	225
43	315
132	409
43	315
135	389
43	315
138	283
43	315
144	162
147	684
43	315
167	273

McDill v. Gunn *et al.*

pay his own debt, not that of another; and in a proceeding to foreclose, the court may decree that the land be sold and render several judgments against the mortgagor and his vendee, and that, for any sum remaining unpaid after the sale of the mortgaged premises, execution be first levied of the property of such vendee.

From the Tippecanoe Common Pleas.

W. C. Wilson, G. O. Behm, A. O. Behm, J. D. Gongar,
and *C. H. Test*, for appellant.

H. W. Chase, J. A. Wilstach, and J. H. Brown, for appellees.

OSBORN, J.—Gunn, one of the appellees, filed a complaint in the Tippecanoe Common Pleas, to foreclose a mortgage upon real estate, executed by Ward and wife to Weaver, to secure six promissory notes of five hundred dollars each, given by Ward to Weaver and assigned by Weaver to him. They were dated December 1st, 1868, and payable in one, two, three, four, five, and six years, with six per cent. interest, and ten if not paid at maturity. The note first falling due had been paid.

The complaint, in addition to the usual averments in a complaint of foreclosure, alleges, "that on or about the 13th day of July, 1869, the defendants William H. Ward and Mary A. Ward, his wife, sold and conveyed by deed said mortgaged real estate to said defendant McDill, for the sum and price of three thousand dollars, and said McDill accepted said deed and agreed to and with said William H. Ward to pay and satisfy to the plaintiff said notes above set forth, so made to said Weaver, and amounting to two thousand five hundred dollars, besides interest, as a part of the purchase-money of said real estate."

Ward filed a cross complaint against McDill and Gunn, setting up substantially the same facts as were stated in the original complaint, and praying for a decree for specific performance against McDill and judgment against him for the full amount unpaid on the notes, that the mortgaged property be sold to pay the judgment, and that any balance left

unpaid after the sale of the mortgaged property be made of the property of McDill before resorting to that of Ward.

McDill filed separate demurrers to the complaint and cross complaint, which were overruled, and exceptions taken. He also moved to strike out certain parts of the complaint, which was overruled, and he excepted.

He then filed an answer to the complaint and cross complaint of three paragraphs. 1st. The general denial to both complaints. The second purports to be an answer to the original complaint. It admits the notes and mortgage and the conveyance to him by Ward and wife, subject to the mortgage. It denies nothing, and concludes as follows: "And as to all the rest of said plaintiff's complaint, except that which seeks to subject to sale said realty described, to pay the debt secured by said mortgage, he says that no memorandum or note thereof is in writing signed by the defendant or by any one by him lawfully authorized thereunto; wherefore, he says said plaintiff is not entitled to any personal judgment against this defendant, in case said realty is insufficient to pay said mortgage debt." The third is an answer to the cross complaint. It admits the execution of the deed of conveyance by Ward and wife, and sets out a copy of the deed. It is an ordinary warranty deed, "subject to the purchase-money mortgage, now held by E. M. Weaver on the same," and avers "that said deed contains the entire agreement and contract between said parties in relation to said real estate;" and that said Ward is not entitled to the relief sought in his cross complaint.

Ward filed a demurrer to the third paragraph of the answer, on the ground that it did not state facts sufficient to constitute an answer to the cross complaint.

Gunn filed separate demurrers to the second and third paragraphs of the answer, on the ground that they did not state facts sufficient to constitute an answer to the complaint.

The demurrer to the second paragraph was sustained and overruled to the third. Exceptions were taken to both rulings.

McDill v. Gunn et al.

The cause was tried by a jury, who returned a general verdict for the plaintiff, and that the amount due upon one of the notes was four hundred and eighty-one dollars and sixty-seven cents, and, also, a finding for the plaintiff on the notes to fall due and the amount of each note specifically, and that McDill did undertake and agree with Ward to pay the notes. And in answer to an interrogatory, they answered that Ward conveyed the real estate described in the complaint to McDill by deed in fee simple, on the day mentioned in the complaint, and McDill, in consideration of the conveyance, agreed to pay and satisfy in full the mortgage debt upon the property.

McDill moved the court for a new trial and filed written causes therefor.

1st. That the verdict was contrary to law and evidence.

2d. That the court admitted improper evidence upon the trial of the cause, over his objections.

3d. The court committed an error in overruling the demurrer to the complaint and cross complaint, and in sustaining the demurrer to the second paragraph of the answer.

4th. The verdict should have been for him on the evidence. The motion was overruled, and he excepted and filed his bill of exceptions, setting out the evidence.

Final judgment of foreclosure was rendered; also, several judgments against Ward and McDill for any sum remaining unpaid after the sale of the mortgaged premises, to be first levied of the property of McDill, all without relief from valuation.

Errors are assigned for overruling the demurrer to the complaint and cross complaint; for overruling his motion to strike out parts of the cross complaint; for sustaining the demurrer of the appellant to the answer and cross complaint; and for overruling the motion for a new trial.

The second cause for a new trial is too general to raise any question. The attention of the court below was not called to any alleged improper evidence. We have uniformly held it necessary to point it out in the motion, in

McDill v. Gunn et al.

order to get the benefit of it in this court. The third cause is not a ground for a new trial. As to the first cause, we have read the evidence and think it sustains the verdict. The fourth is included in the first.

The appellant relies chiefly upon the rulings of the court below upon the demurrers for a reversal of the judgment. He insists that the agreement to pay the notes and mortgage was an undertaking to pay the debt of another, and not binding upon him because not in writing. He also insists that by executing a deed conveying the property "subject to the mortgage," Ward precluded himself from establishing by parol a promise to pay the purchase-money.

Conveying the land subject to the mortgage does not tend to show that the appellant did not promise to pay for it. Its effect is to except the mortgage from the covenant against incumbrances. It does not affect the agreement to pay the purchase-money. Parol evidence may be introduced to show that the consideration has not been paid, or that it is more or less than the amount specified, notwithstanding the recital of the amount and the acknowledgment of its receipt in the deed; not for the purpose of defeating the conveyance, but to fix the amount of the consideration. 3 Washb. Real Prop. 327; *Grout v. Townsend*, 2 Hill N. Y. 554. Parol evidence may be given to show the real consideration of a deed, and that the purchaser took the conveyance subject to incumbrances and agreed to discharge them in addition to the consideration stated in the deed. *Allen v. Lee*, 1 Ind. 58; *Rockhill v. Spraggs*, 9 Ind. 30; *Pitman v. Conner*, 27 Ind. 337; *Robinius v. Lister*, 30 Ind. 142.

The promise to Ward to pay the notes and mortgage may be enforced by the holder. *Bird v. Lanius*, 7 Ind. 615; *Day v. Patterson*, 18 Ind. 114; *Cross v. Truesdale*, 28 Ind. 44; *Davis v. Calloway*, 30 Ind. 112; *Marlett v. Wilson's Ex'r*, 30 Ind. 240; *Burr v. Beers*, 24 N. Y. 178. In the case last cited, it was held that the mortgagee might maintain a personal action against a grantee of the mortgaged premises, who assumed to pay the incumbrance.

The appellant purchased the property for three thousand dollars, and agreed to pay off the notes and mortgage in suit, as a part of the purchase-money. He agreed to pay his own debt to the holder of the notes against his vendor, not the debt of another. Whenever the promisor's agreement is, in effect, to pay off his own debt, though that of a third person be incidentally guaranteed, it is not necessary that the agreement should be in writing. Browne Frauds, sec. 165; *Gold v. Phillips*, 10 Johns. 412. In that case the defendants had bought a farm, and as part payment agreed to pay the plaintiff a debt against the vendor. The court, on page 414, said: "The promise of the defendants was not within the statute of frauds. It had no immediate connection with the original contract, but was founded on a new and distinct consideration. * * * The defendants made the promise in consideration of a sale of lands made to them by Aaron Wood; and they assumed to pay the debt of the plaintiffs, as being, by arrangement with Wood, part payment of the purchase-money." *Barker v. Bucklin*, 2 Denio, 45. In that case the action was upon a promise by the defendant in consideration of a pair of horses delivered to him by his brother, a debtor of the plaintiff, to pay him the value of the horses toward the debt, which the seller of the horses owed the plaintiff. The judge delivering the opinion of the court reviews the authorities and on page 60 says: "There cannot be any objection arising under the statute to the enforcing a promise made upon good consideration, by a third person to a debtor, to pay his creditor a specified debt, although such agreement is not in writing. The statute does not embrace such agreement, but only an agreement by which one party promises the other to answer for the debt, etc., of another person." And on page 61 he says: "It was not a promise to answer for the debt of another person, but merely to pay the debt of the party making the promise, to a particular person designated by him to whom the debt belonged, and who had a right to make such payment a part of the contract of sale. Such promise was no

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more within the statute of frauds than it would have been if the defendant had promised to pay the price of the horses directly to his brother of whom he purchased them." *Helms v. Kearns*, 40 Ind. 124.

An additional brief is filed by the appellant, in which it is claimed that the judgment authorizing a sale without relief is erroneous. No objection was made or exception taken to the rendition of the judgment in that form, and no error has been assigned for that cause. If it was an error, it is not available to the appellant.

The judgment of the said Tippecanoe Common Pleas is affirmed, with costs.

PEERY v. THE GREENSBURGH, KINGSTON, AND CLARKSBURGH
TURNPIKE COMPANY.

43	321
130	381
43	321
158	92
43	321
171	316

PRACTICE.—Demurrer.—Where a cause has been tried on issues joined upon a complaint containing two paragraphs, one defective and the other good, a demurrer to the former having been overruled, the record not showing that the cause was tried and the judgment rendered exclusively upon the good paragraph, the judgment will be reversed for error in overruling the demurrer to the defective paragraph. To sustain a judgment in such a case, the record must affirmatively show that the finding and judgment proceeded wholly upon the good paragraph.

From the Decatur Circuit Court.

J. Gavin, J. D. Miller, J. S. Scobey, and O. B. Scobey, for

appellant.

W. Wilson, S. A. Bonner, C. Ewing, and J. K. Ewing,

appellee.

USKIRK, J.—The appellee sued the appellant on a subscription of three shares of the capital stock of such company.

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The complaint was in two paragraphs. A demurrer was overruled to each paragraph of the complaint, to which an exception was taken. The appellant refusing to plead further, final judgment was rendered for appellee.

The appellant has assigned for error the overruling of the demurrer to the complaint.

Counsel for appellant concede that the second paragraph of the complaint was probably good. We think it was good.

Counsel for appellee admit that the first paragraph was bad. Such an admission saves us the trouble of so holding.

The appellant was a subscriber to the original articles of association. The objections urged to the first paragraph of the complaint are:

First. That it does not show the length of the proposed line of road, nor that the requisite amount of stock per mile had been subscribed.

Second. That the subscription was made upon a condition as to the line of location, and that performance of such condition was not alleged.

Both paragraphs of the complaint were based upon the same instrument. The second contains all the allegations of the first, with the additional ones which the appellant claims were necessary to make the first good.

It is insisted by the counsel for appellee that it is a well established rule of practice that appellate courts will not disturb a judgment on account of any ruling on a demurrer to one of several counts or paragraphs either in a declaration or answer, unless it appears that a finding has been made upon a bad paragraph; and reference is made to *Blasingame v. Blasingame*, 24 Ind. 86, and *Knox County Bank v. Lloyd's Adm'rs*, 18 Ohio St. 353, as supporting such position.

The Ohio case seems to support the position assumed, but a different rule has prevailed in this State.

The case referred to in 24 Ind. does not support the proposition contended for. In that case there were two paragraphs

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in the complaint. The overruling of a demurrer to the first paragraph was assigned for error. The court refused to consider the question, because it plainly appeared from the record that the finding and judgment proceeded wholly upon the second paragraph, which was conceded to be good.

The ruling in the above case was followed, in principle, in the case of *Wolf v. Schofield*, 38 Ind. 175, where it was held, that "where a cause has been tried upon issues joined upon a complaint containing two paragraphs, one defective and the other good, a demurrer to the former having been overruled, the record not showing that the cause was tried, and the judgment rendered, exclusively on the good paragraph, the judgment will be reversed for error in overruling the demurrer to the defective paragraph."

In the present case there was a general finding upon a complaint containing two paragraphs, one defective and the other good, and there is nothing in the record showing that the finding and judgment proceeded wholly upon the good paragraph. The two cases are alike, and it results that the judgment must be reversed.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to grant a new trial, sustain the demurrer to the first paragraph of the complaint, and for further proceedings in accordance with this

KEENE v. THE KNIGHTSTOWN AND MIDDLETOWN TURNPIKE
COMPANY.

From the Henry Circuit Court.

J. T. Elliott, M. E. Forkner, and E. H. Bundy, for appellant.

J. Brown and T. B. Redding, for appellee.

Milner v. Noel.

DOWNEY, C. J.—This action was to recover the amount of a subscription alleged to have been made by the appellant to the capital stock of the appellee, and there was judgment, in the cause, for the plaintiff.

The errors assigned are the overruling of a demurrer to the complaint, and the refusal to grant a new trial.

The learned counsel for the appellant abandon the first alleged error, but insist that the court should have granted the new trial, on account of the insufficiency of the evidence to sustain the verdict of the jury. The question was, whether the defendant had authorized the subscription to be made for him or not. It was not claimed that he had made it with his own hand, but that he had authorized it to be done. The jury found this fact against him. We have carefully examined the evidence in the record and are of the opinion that we can not disturb the judgment on this ground.

The judgment is affirmed, with five per cent. damages and costs.

MILNER v. NOEL.

ARBITRATION AND AWARD.—*Evidence*.—It is a good ground of objection to an award, expressly made so by statute, 2 G. & H. 345, sec. 16, that the arbitrators “refused to hear evidence material and pertinent to the controversy.”

SAME.—*Answer*.—Where it was shown by the submission to arbitration that the partnership goods of the parties went into the hands of one party, after the dissolution of their partnership, for the purpose of adjusting and settling the partnership affairs, and that the submission to arbitration was for the purpose of settling said affairs, an answer alleging the refusal of the arbitrators to allow the other party to prove that the partner into whose hands the goods were so placed, by a sale or resale of the goods, made a profit for which he had not accounted, was a valid objection to the award.

SAME.—Such answer was not bad because it did not recite all the evidence given on the trial before the arbitrators.

SAME.—In arbitration cases arising under the statute, there is no rule of law

Milner v. Noel.

by which a party excepting to an award can have a trial by jury; and the court in refusing a demand for a jury trial in such case commits no error.

From the Posey Circuit Court.

W. M. Hoggatt, E. M. Spencer, and J. H. Loudon, for appellant.

A. P. Hovey and G. V. Mensies, for appellee.

DOWNEY, C. J.—This was a proceeding by the appellee against the appellant, to enforce the performance of an award, made in favor of the appellee against the appellant in pursuance of a submission which was made a rule of said circuit court in pursuance of the statute concerning arbitrations and umpirages. 2 G. & H. 342. Upon the making of the preliminary proofs required by section 13 of the act, a rule was granted against the appellant to show cause why judgment should not be rendered by the court upon the award. The parties had been partners in the sale of merchandise, the firm had dissolved, and the submission was for the purpose of an adjustment of the partnership business and accounts.

Upon return of the rule, the appellant showed cause: 1. The manifest partiality of one of the arbitrators, who is named, for the plaintiff in making the award. And, 2. That the arbitrators refused to permit the defendant to prove by one John M. Noel, that the plaintiff, after the dissolution of the firm of Noel & Milner, and after the transfer and delivery of the assets of said firm to said William J. L. Noel, by a resale of the goods received by him, amounting in value to four thousand nine hundred and twenty-seven dollars and fifty-seven cents, made and realized a profit by such resale of the sum of one thousand dollars, for which he never accounted or charged himself in the settlement of the business of the firm, and for no part of which did the defendant ever receive credit; which testimony the defendant avers was material and competent in the trial of the said cause, the said John M. Noel being a competent witness, and the only witness by whom the defendant could prove said fact.

The plaintiff replied to the first paragraph of the answer by a general denial, and demurred to the second on the ground: 1. That it did not state facts sufficient to constitute a cause why the rule should not be made absolute by the rendition of judgment on the award. 2. That there was no statement of the whole evidence adduced before the arbitrators in the record.

This demurrer was sustained, and the defendant excepted. The defendant then demanded to have the issue formed on the first answer or objection tried by a jury, which demand was refused, and he excepted. The court then tried the issue, and, disallowing the objection to the award, found for the plaintiff. The defendant moved the court for a new trial, assigning for causes: 1. That the finding of the court was not sustained by sufficient evidence. 2. It was contrary to law and the evidence. 3. Because the court refused the request of the defendant for a jury trial of the cause. And, 4. Because the court received in evidence the written agreement of the plaintiff and defendant over the objection of the defendant.

There is a bill of exceptions showing the demand for a trial by jury, the refusal thereof, and an exception to the ruling, but there is no bill of exceptions setting out the evidence which was given.

The errors assigned are the following: 1. The court erred in sustaining the demurrer of the appellee to the second paragraph of the answer. 2. In overruling the appellant's motion for a new trial. 3. In refusing the request of the appellant for a jury trial.

The first question to be considered is the sustaining of the demurrer to the second paragraph of the answer. It is a good ground of objection to an award, expressly made so by statute, 2 G. & H. 345, sec. 16, second division, that the arbitrators "refused to hear evidence material and pertinent to the controversy." The answer alleges that the evidence was material and competent, and that the witness was competent to testify. Was it, in fact, material, as shown by the

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record? The matter in controversy, as shown by the bond or agreement of submission, is stated as follows: "That whereas there heretofore existed a partnership between William J. L. Noel and Sylvanus Milner in the business of selling and trading in general merchandise, and such other business as is incident thereto, said business having been conducted in, etc., and whereas said business was dissolved by the mutual consent of said partners, and the effects of said firm placed in the possession of the said William J. L. Noel for adjustment and settlement, and whereas said business between said Noel and Milner remains unsettled, and said parties being mutually desirous to make a settlement and adjustment of said business without the litigation of courts. Now, therefore, in consideration of the premises, the said Noel and Milner have agreed and do hereby agree to submit all matters of difference and dispute between them in reference to said partnership and all matters between them growing out of said partnership business to the arbitration of," etc.

It is shown by the submission that the partnership goods went into the hands of Noel after the dissolution, for the purpose of adjusting and settling the partnership affairs. The proposition was to prove by a competent witness that he, by a sale or resale of the goods so in his hands, made a profit of one thousand dollars, for which he had not accounted. Judge STORY says: "If any partner has, after the dissolution, misapplied the partnership funds, and made profits thereby, he will be made accountable for all such profits; but the losses, if any, must be borne by himself." Story Part., sec. 329, and cases cited. But it is contended that the paragraph in question is bad, because it did not set out all the evidence that was given in the trial before the arbitrators. We do not think that this was necessary. We are of the opinion that the objection, if true, is a valid objection to the award.

We are not aware of any rule of law by which the party excepting to an award in cases like this can have a trial by jury. In *Goodwine v. Miller*, 32 Ind. 419, which was an action on a common law award, this court held that a

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trial by jury might be had. But the court was careful to distinguish that kind of case from such as this. The court said: "This was an action on a common law award, and not a rule of court to show cause why judgment should not be rendered thereon." The statute provides, that "the court shall hear the proofs and allegations of the parties, to invalidate and sustain such award or umpirage, and shall decide thereon, either confirming such award or umpirage, or may modify and correct the same in the cases prescribed in the last preceding section so as to effect the intent thereof, and to promote justice between the parties, and shall render judgment on such original or corrected award or umpirage; or the court may vacate such award or umpirage for any of the causes hereinbefore specified at the cost of the parties seeking to enforce such award or umpirage." 2 G. & H. 347, sec. 18. It seems quite clear to us that in refusing a jury trial the court committed no error.

We think it unnecessary to pass upon any of the other questions, if there are others, in the record; as for the wrongful sustaining of the demurrer to the second paragraph of the answer, the judgment must be reversed, and such other questions are of no further interest in the case.

The judgment is reversed, with costs, and the cause remanded, with instructions to overrule the demurrer to the second paragraph of the answer, and for further proceedings.

43	328
125	479

THE MONTMORENCY GRAVEL ROAD COMPANY v. STOCKTON.

APPEAL.—*From Justice of the Peace.*—*Appeal by each Party.*—Where a cause is appealed from a justice of the peace by each party, only one transcript is necessary, and only one cause should be docketed in the appellate court.

SAME.—If the appeal of each party is not taken at the same time, to complete the transcript, it will only be necessary for the justice of the peace to certify the entry relating to the second appeal and file the appeal bond.

The Montmorency Gravel Road Co. v. Stockton.

SAME.—The dismissal of the appeal in such case by the party first appealing will not give him a right to withdraw the transcript.

GRAVEL ROAD.—*Proceeding to Condemn Lands.—Damages.—Instructions.—*

In a proceeding to condemn and appropriate lands for the use of a gravel road, where the lands are unimproved, it is not error to instruct the jury that they may consider the value of the land appropriated, together with any injury to the residue naturally resulting from the appropriation and construction of the road, such as cutting fields into an inconvenient shape, destroying the convenience and advantage of water for stock, and rendering additional fencing necessary.

SAME.—The damages are assessed in such cases once for all, and the jury should look to every circumstance resulting from the appropriation, present and future, which affects the present value of the land.

From the Carroll Circuit Court.

J. A. Stein, S. A. Huff, B. W. Langdon, J. S. Pettit, and J. H. Gould, for appellant.

L. B. Sims, for appellee.

DOWNEY, C. J.—The appellant is a corporation organized under the act of May 12th, 1852, on the subject of plank, macadamized, and gravel roads, 1 G. & H. 474, and this was a proceeding commenced before a justice of the peace under the seventh section, to condemn and appropriate land of the appellee for a right of way for the road of the company. Damages were assessed in favor of the appellee before the justice of the peace, and the company on the same day, that is, the 8th of July, 1869, appealed to the circuit court, having filed the necessary appeal bond. The certificate to the transcript of the justice of the peace bears date July 26th, 1869. On that day the appellee herein also filed with the justice an appeal bond and prayed an appeal, which was granted. It appears that the justice made an entry on his docket of the taking of the appeal by the appellee, a separate transcript of which entry he made out and certified at the same date, the 26th of July 1869, and which, together with the transcript of the proceeding down to and including the taking of the appeal by the appellant herein, and the two appeal bonds and other original papers, he filed with the clerk of the circuit court at the same time, that is, the 26th day of July, 1869. The cause, on appeal in

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the circuit court, was docketed as one action or proceeding. On the application of the appellee herein, the venue was changed from the Tippecanoe to the White Circuit Court. After several continuances in that court, the venue was again changed, this time on the application of the company, to the Carroll Circuit Court. In this court the company dismissed its appeal and then moved the court for leave to withdraw the original transcript made by the justice of the peace, on which its appeal was based. This motion was overruled by the court. The company then moved the court to dismiss the appeal of Stockton, the appellee herein, for the reason that the same was not supported by any transcript from the docket of the justice of the peace, issued upon the appeal taken by him on July 26th, 1869. Thereupon, on motion of Stockton, leave was granted him to perfect the transcript made out at the time of his appeal, and after this was done the court overruled the motion of the company to dismiss his appeal. To each of these rulings the company excepted by proper bill of exceptions. Thereupon there was a jury trial, a verdict for the appellee for an increased amount of damages, a motion for a new trial and in arrest of judgment made by the company overruled, and final judgment for the appellee.

It is assigned for error in this court that the circuit court erred in overruling the appellant's motion for leave to withdraw the transcript; in overruling the appellant's motion to dismiss the appeal of the appellee; in permitting the appellee to perfect his transcript; in assuming jurisdiction of the appellee's appeal after appellant's appeal had been dismissed; in overruling appellant's motion for a new trial; in overruling appellant's objection to a judgment being rendered against him; and in overruling the appellant's motion in arrest of judgment.

With reference to the motions to withdraw the transcript, to dismiss the appeal of the appellee, and allowing him to perfect the transcript, etc., we are of the opinion that there was no error in the rulings of the court. It is assumed by

counsel for the appellant, that when each party appeals, there must be two cases docketed in the appellate court, and that there must be separate transcripts made and filed with each appeal. The statute, under which the appeal in this case from the judgment of the justice of the peace was taken, provides, that either party may appeal "as in other cases." 1 G. & H. 476, sec. 7, proviso. The statute relating to appeals in other cases requires the justice to make out a transcript and transmit the same, together with the bond, "and all other papers in the cause," to the clerk, etc. 2 G. & H. 595, sec. 66. As the original papers must be filed by the justice with the transcript, and as they can not be on file in two places or in two cases at the same time, it would seem to result that there can and should be but one cause docketed in the appellate court, where both parties appeal. Another reason against the position of counsel for the appellant is, that if there should be two cases docketed, there would have to be two trials, one in each case docketed, which might result differently, and thus complicate matters instead of settling them. There was no objection to the course pursued in the circuit court by the appellant in dismissing its own appeal. But we do not perceive how this could affect the appeal of the appellee. Nor do we see the necessity of any further transcript. When another transcript was obtained, it must necessarily be but a copy of the one already on file. The court was not bound to allow the appellant to withdraw the transcript filed by the justice. It seems to us that as the transcript was filed at the same time that the appeal bonds and other papers were filed, it could be regarded as being as much the transcript of one party as the other. When the second appeal was prayed, the justice of the peace made an entry of that fact, and he also made out and certified a transcript of this entry and filed it with the transcript of the former part of the docket entries in the case, and thus the two transcripts made a complete copy of all that was on the docket relating to the case. These transcripts were put on file at the same time with the two bonds

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and the other papers in the cause. This, in our opinion, was sufficient for the appeal of both parties without any further transcript.

Several reasons were assigned for a new trial. The one which seems to be relied upon here is that calling in question the correctness of the following instruction given by the court to the jury: "The value of the land appropriated, together with any injury to the residue of the land from which it is taken, naturally resulting from the appropriation and the construction of the road thereon, such as cutting the fields into an inconvenient and ill shape, destroying the conveniences and advantages of water for stock to a portion of the farm, and rendering an additional amount of fencing necessary to a safe and proper use thereof, are all proper matters to be considered in estimating the damages in such cases." This instruction is conceded to be taken from the language of this court in *The Whitewater Vailey R. R. Co. v. McClure*, 29 Ind. 536. But it is claimed that it was erroneous because not applicable to the case made by the evidence in this action. The evidence being all in the record, the instruction must, of course, be considered with reference to it. The company appropriated sixty feet in width of the land running diagonally through the north part of an eighty-acre tract of the appellee, making a little less than two acres. A county road runs east and west along the north side of the tract. The road of the company cuts off about ten acres in a triangular form between it and the county road. The jury found specially in answer to interrogatories, that the company appropriated two acres, less four rods, worth \$88.87½; that Stockton suffered damages in the sum of two hundred dollars, on account of having the ten acres cut off and left in an isolated condition, leaving it in a bad shape; and the further sum of one hundred and two dollars, on account of having the residue of the tract reduced to a bad shape. The general verdict was for the aggregate of these amounts, \$390.87½. The whole eighty-acre tract was in timber, and had never been under cultivation. The objection urged against

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the instruction is, that "what remained of the land, after deducting the strip taken by the company, was just as fit as it ever had been for all uses it had been put to at any time before; and that access to the tract had been much improved and facilitated by the company's road. Stockton was under no new necessity of fencing on account of that road, for his tract had always stood and still stands open on all sides. •How, under such circumstances, the jury could see two hundred dollars damages to the north end and one hundred and two dollars to the south, surpasses the power of a rational mind to explain."

So far as the instruction relates to fencing rendered necessary by the running of the road of the appellant through the land, it is enough to say that nothing seems to have been allowed by the jury on that account. We do not see any valid objection to the instruction in question, taken in connection with the evidence. The damages are assessed in such cases, once for all, and the jury should look to every circumstance present and future, which affects the present value of the land, resulting from the appropriation. The evidence fully warranted the jury in finding as they did, as to the different items going to make up the aggregate amount of the verdict.

The judgment is affirmed, with ten per cent. damages and costs.

WOODWARD ET UX. v. LINDLEY ET AL.

EVIDENCE.—*Husband and Wife.*—In an action brought by a husband and wife to recover rent claimed to be due on a written lease made by the husband and wife, it was not error to allow the defendant to testify that he negotiated with the husband when renting the premises, to show the relations of the parties and as tending to establish the agency of the husband for the wife.

WITNESS.—*Husband and Wife.*—*Lease of Wife's Real Estate.*—Where a lease is executed by a husband and wife, but it is stipulated that the rent is payable to the wife, and the premises are to be surrendered to her, an action for the

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rent brought in the name of the husband and wife concerns the separate estate of the wife, and the husband has no interest in the action except that he would be liable for costs if the same could not be made out of her property, and in such action the husband is not a competent witness.

LEASE.—Husband and Wife.—Authority of Husband to Accept Surrender.—

Authority on the part of a husband to receive rent for his wife's premises, and to direct repairs, will not authorize him to accept a surrender of the demised premises.

SAME.—Where the premises of a wife are leased for a term of years, and by the express terms of the lease the surrender of the premises, at the expiration of the lease, by lapse of time or otherwise, is to be to the wife, though the husband may be authorized to accept payment of rent and to direct repairs, handing the keys of the premises to him before the expiration of the term, without stating the purpose of their being handed to him, and his acceptance of them without any agreement that the premises shall be surrendered, or that the lessor may have possession, will not amount to a surrender of the lease and premises.

From the Vanderburg Circuit Court.

C. Denby and D. B. Kumler, for appellants.

A. Iglehart, J. M. Shackelford, and J. E. Iglehart, for appellees.

OSBORN, J.—This was an action brought by the appellants against the appellees, to recover the amount alleged to be due upon a written lease. A copy of the lease was filed with the complaint. It was made by the appellants (husband and wife) to the appellees, and the term demised was "from the first day of January, 1867, to the first day of January, 1872." The appellees were to pay to the appellant Adaline a rent of eighteen hundred dollars per year, in monthly instalments of one hundred and fifty dollars at the end of each month, and upon the expiration of the lease, either by lapse of time or otherwise, to surrender the premises peaceably to Mrs. Woodward.

The appellees answered, by alleging that on the 1st day of October, 1870, they paid to the appellants all rent in arrears and all rent due to that date and surrendered the demised premises to the plaintiffs, who accepted the same. To that answer the appellants replied:

1. The general denial.

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2. Admitting the payment of rent to October 1st, 1870, except twenty-five dollars, and alleging that the sum of one thousand six hundred and fifty dollars was due for rent from Sept. 1st, 1870, to the bringing of the action, being for eleven months, and denied the alleged surrender.

There was a trial by the court, finding for the appellees, and over a motion for a new trial judgment was rendered on the finding.

The causes assigned for the new trial were: That the court allowed the defendant James F. Lindley to testify that he negotiated with John K. Woodward when he was renting the premises. 2. That the court erred in refusing to allow John K. Woodward to testify as a witness. 3. That the finding was not sustained by the evidence.

The error assigned is in overruling the motion for a new trial.

The court committed no error in allowing the witness to testify that he negotiated with John K. Woodward when he was renting the premises. The appellees were attempting to prove that he was the agent of Mrs. Woodward, who was admitted to be the owner of the demised premises. The alleged surrender was made to him. The evidence was admissible, to show the relations of the parties, and as tending to establish his agency. Its weight would depend upon the other evidence in the case.

The action was upon a joint demise, it is true, but the rent was payable to the wife, and we think we may safely say that the husband joined to enable the wife to make a valid lease. By its terms the rent was not only payable to her, but the surrender was required to be made to her. The action was concerning her separate estate. The husband had no interest in it, except that, having joined her in the action, he would be liable for costs, if it could not be made out of her property. If he testified in the case, he must do so for or against her. The case of *Albaugh v. James*, 29 Ind. 398, was an action against husband and wife for the abduction of the wife of the plaintiff. And the court held the husband

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could testify in his own behalf and the wife in hers, but neither for the other. The plaintiff could not deprive them of that right by joining them as defendants in the same action. If the husband in the case at bar had not been joined as plaintiff, it would be clear that he could not be a witness for his wife. He cannot be rendered competent to testify by being joined as plaintiff, under the guise of testifying in his own behalf, when, as in this instance, he had no interest in the action.

The main question in the case is; whether the premises were surrendered and the rent paid to the time of the surrender, as alleged in the answer.

It is not pretended that the surrender was made to Mrs. Woodward in person. If it was made at all, it was made to Mr. Woodward. We give the evidence of the appellees, which they say in their brief is relied on.

One Huckleby testified: "I reside in New Albany, Indiana. In September, 1870, I acted as attorney agent for the defendants, and have been their attorney agent ever since. The Lindleys sent me the keys to surrender the house for them. I took the keys of the store which they rented from Mrs. Woodward into Mr. Woodward's store. There were three keys. One of the clerks asked me what he could do for me. I said I wanted to see Mr. Woodward. As I spoke, Mr. Woodward rose up from near the stove, at the back end of the store, and came to me, and I handed him the keys. I told Mr. Woodward, 'Here are the keys that belong to the store-house that the Lindleys had of yours.' Mr. Woodward looked at them, took them in his hand and said, 'All right; thank you, sir.' I do not know anything about Mr. Woodward acting as the agent of Mrs. Woodward. This was Friday, September 30th, 1870. My distinct impression is, that two festivals were held in the store that had been occupied by the defendants, after they left. My recollection is, that the festivals were held by the Methodist church and the Colored church; they must have been held there, because there was a good deal of plunder in the store next door. I

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have been living in New Albany since the 22d day of April, 1870. I have known Mr. Woodward for ten years. After the defendants left, there was a placard hanging in the window of the store, with the words on it: 'This store for rent.' I do not know what was signed to it. My brother paid the last month's rent; I was not present when it was paid; think the store was occupied by a bird man for two weeks. All the rent was paid up to the first of October, when the surrender was made."

On cross-examination, the witness testified as follows:

"My brother's name is George P. Huckleby; he and I are lawyers, and are doing business together in New Albany. I received the keys by express, and before I came here I examined the envelope so as to see when I received it. There were three keys; one small brass key; I do not remember what kind of keys the others were. I do not know the date at which the festivals were held, but think it was fall or winter. The Lindleys left in September. The one hundred and twenty-five dollars was paid the latter part of October or first of November."

James F. Lindley testified as follows:

"My name is James F. Lindley; am one of the defendants. During the tenancy, I paid rent to John K. Woodward, Mrs. Woodward, and to Mr. Welborn, their son-in-law. Rents were paid to them."

In answer to the question, "With whom did you negotiate when you were renting the premises?" he said, "I negotiated altogether with Mr. Woodward." He then proceeded as follows: "When I paid rent, I paid Mr. Woodward; when I wanted anything, I saw him in reference to it. I saw him in reference to the repairs, and he always attended to the repairs. I authorized the Hucklebys to make the surrender. When I authorized them to do it, I was in their office. I was in New Albany several times after the surrender was made. I made application to Mr. Woodward for reduction of rent. Previous to the first of June, 1870, I had a

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talk with Mrs. Woodward about reducing the rent; I wanted it reduced for several reasons; one reason was, that the plaintiffs had not complied with their agreement about the occupation of the adjoining houses. It was agreed by Mrs. Woodward that the rent should be reduced three hundred per year. When I left New Albany I agreed with Woodward that he was to take an account against Hawkins in part for the last month's rent, for balance of rent. When I was in New Albany, in October, Mr. Woodward said he could not accept the account for the rent. I sent money to Huckleby & Huckleby, and they paid the rent. In October or November I was in New Albany. I went to Mr. Woodward and asked him to lend me the key of the store to get some rubbish that I had promised to Kent. He loaned me the key and cautioned me to return it to him, and not leave it with Kent. The first key would not open the door; I went back and got another. We got into the store. I left the key with Mr. Kent. The next evening I saw Mr. Woodward, and he asked me why I had not returned the key. I went and got it for him, and delivered it to him. I have receipts for the rent; they are in this book." [Then follow the receipts.]

The receipts show the payment of the rent in full to Aug., 1870, inclusive. The one for December is for one hundred and twenty-five dollars on account of rent for that month.

Cross-examination.—"I paid the rent sometimes, and sometimes the book-keeper paid it. This book contains all the receipts except the last. Mrs. Woodward came to the store for the rent. In one instance we were authorized to pay Mr. Welborn. Mrs. Woodward went to England, and during her absence we paid her son-in law. Once we paid \$500. Mrs. Woodward did not come every month, but came often. After the first of March, 1870, I paid one hundred and fifty dollars every month, and she paid me twenty-five dollars back. I did not leave the keys with Mr. Woodward to get a tenant. I did not go to Mr. Woodward and tell him that Mr. McKitrick had the keys. I brought the keys to Evans-

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ville when I came, about the 12th or 14th of September. I never tried to rent the store to a man in Louisville. I never authorized any one else to rent the store. I came off and left the store, and have done nothing else but send keys there. There was a festival in the store next door to us, two months before we came down to Evansville. I do not remember how often I paid Mrs. Woodward rent; but not often. The receipts will show."

The defendant then read the following receipt:

"NEW ALBANY, Ind., Feb. 11th, 1871.

"Received of J. F. Lindley & Bro. one hundred and twenty-five dollars on rent account, for Mrs. A. Woodward.

"JOHN K. WOODWARD."

Mrs. Woodward testified in her own behalf, that she never accepted any surrender; that none was ever offered her; that she told Hiram Lindley she would not release them from paying rent; that she refused one hundred and twenty-five dollars rent offered her by George Huckleby, the brother of the witness Huckleby; that she told Geo. Huckleby after the key had been left at her husband's store to take it and attend to the renting himself, and Geo. Huckleby said all right; this was in November or December, 1870; that she collected her own rents and told James Lindley that he must pay to her in person; that she refused to reduce the rent, but agreed that if one hundred and fifty dollars was paid her every month promptly, she would give him back twenty-five dollars a month as a donation; that she never put any placard in the window and authorized none to be put there; that no festival was ever held in the store; that the store remains exactly as Lindleys left it; that she told J. F. Lindley in November not to break the door, but get the key when he wanted his friends to go in the store; that J. F. Lindley, in November, 1870, asked J. K. Woodward if he had got a tenant for him; that twenty-five dollars of rent remains in arrear up to October 1st, 1870; that her husband was not her agent, and she had no agent; that Woodward assisted her in fixing up the lease; that the lease was drawn after the Lindleys were

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in the house ; that nothing was ever said to her by either of the Lindleys about surrendering the premises ; that she had a talk with Hiram, in which she said that if Jim left she would rent the premises to Hiram, but if both went to Evansville, she would have all the rent ; that when she was absent her husband or Mr. Welborn collected the rent, but she always collected when at home. She said, " After I heard the key was left at the store, this was in November or December, 1870, I went to see George Huckleby ; I met him on the street ; I told him to go and get the key of the store and attend to the renting of it himself ; that Mr. Woodward had too much to do to attend to it for the Lindleys. He said, ' all right. ' "

There was no evidence showing that Mr. Woodward had any authority to accept a surrender as the agent of Mrs. Woodward. The appellees contend that, because he was her agent to receive rent and make repairs to the building, it followed that he was authorized to accept a surrender of the demised premises. We think otherwise. The authority to collect the rent recognized the existence of the lease, and that it would continue uncanceled and in full force ; the authority to accept a surrender contemplated its destruction. One is to accept performance of the contract, the other a release from it. Huckleby testified that he knew nothing about Mr. Woodward acting as the agent of Mrs. Woodward. The appellees sent him the keys to surrender, and he handed them to Mr. Woodward, saying, " Here are the keys that belong to the store-house that the Lindleys had of yours. " He did not even state why he gave them to him. Nothing was said about surrendering the lease or the house. He also testified that his distinct impression was that two festivals were held in the store, and that there was a placard in the window of the store after the appellees left, with the words on it, " This store for rent ; " but he does not state whether the festivals were held or the placard was in the window after he gave up the keys. Nor does he state when the bird man occupied the store. The evidence fails

to show that Mrs. Woodward ever went into possession of the premises.

The court below must have found for the appellees, on the ground that Mr. Woodward, being the agent for his wife to receive rents, was her agent to accept a surrender of the lease and premises, and that the acceptance of the keys was an acceptance of such surrender.

"It may be assumed that there must be a mutual agreement between the lessor and original lessee, that the lease is terminated, in order to work a surrender. But this may be implied and not always be express. * * * And the return and acceptance of the key may be evidence of such surrender of possession." 1 Washb. Real Prop. 354.

The key must be returned and accepted with a view to terminate the tenancy, to make it evidence of a surrender. "An actual and continued change of possession, by the mutual consent of the parties, will amount to a surrender by operation of law." Taylor Landlord & Tenant, sec. 515.

"A surrender is defined to be the yielding up of an estate for life or years to him who has an immediate estate in reversion or remainder, wherein the estate for life or years may drown or merge by mutual agreement between the parties." 2 Platt Leases, 499.

In the case at bar it is admitted that the reversion was in Mrs. Woodward. By the express terms of the lease the surrender was to be to her. We are clearly of the opinion that there was no surrender to her or any agent authorized to accept such surrender. Mr. Woodward, as we have seen, had no such authority, nor did he attempt to exercise any. The agent of the appellees handed the keys of the store to him without stating the purpose, and he accepted them. There was no agreement that the premises should be surrendered, or that the lessor might have possession of the store. Nothing was said or done that could have prevented the appellees from demanding the keys and occupying the store.

Surrenders are said to be "either in express words, by which

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the lessee manifests his intention of yielding up his interest in the premises to the lessor; or by operation of law, when the parties, without any express surrender, do some act which implies that they have both agreed to consider the surrender as made." Taylor L. & Ten., sec. 507. An express surrender is by agreement. The term, surrender by operation of law, "is applied to cases where the owner of a particular estate has been a party to some act, the validity of which he is by law afterward estopped from disputing, and which would not be valid if his particular estate had continued to exist. * * * In such case it will be observed there can be no question of intention. The surrender is not the result of intention. It takes place independently, and even in spite of intention." *Lyon v. Reed*, 13 M. & W. 285-305. Many instances are given in which a surrender by operation of law has been made, but we have not been able to find one in which it has been so held, where the lessee simply handed the key of the premises to the lessor, without in any manner declaring or making known his purpose, and when no change of possession followed the delivery of the key. Nor have we been able to find any case where an authority to receive rent and make repairs could be construed into an authority to receive a surrender of the demised premises.

In the case at bar, by the uncontradicted testimony of Mrs. Woodward, it appears that as soon as she heard of the delivery of the keys to her husband, she went to the agent of the appellees and told him to go and take them back and attend to the renting of the property for the appellees himself, to which he assented.

We are unable to find in the testimony any evidence of a surrender. The new trial ought to have been granted.

The judgment of the said Vanderburg Circuit Court is reversed, with costs; the cause is remanded, with instructions to that court to grant a new trial, and for further proceedings not inconsistent with this opinion.

Scudder *et al.* v. Crossan.

SCUDDER ET AL. v. CROSSAN.

PLEADING.—Malpractice.—Contributory Negligence.—Where a complaint alleged that the defendants were practising physicians and surgeons, and as such undertook to set a broken arm of the plaintiff's infant son, and that by reason of their unskilfulness, negligence, and want of care in treating the arm, it inflamed, mortified, and had to be amputated;

Held, that the averments were sufficient to show that the plaintiff and his son were without fault, and that their negligence did not contribute to the result.

Held, also, that the allegation that the injury was caused by the want of professional skill and care of the defendants must be proved, and was not sustained if it appeared that the negligence of the plaintiff, or of his son, contributed to the injury.

SAME.—A complaint, alleging that the defendants, being physicians and surgeons, were called on and requested, for a reasonable compensation, to set a broken arm of the plaintiff's son, and that they undertook the same, was not bad on demurrer for not showing who employed the defendants; if uncertain in this respect, a motion to have it made more specific was the proper remedy.

From the Daviess Circuit Court.

N. F. Malott, T. R. Cobb, and S. H. Taylor, for appellants.

J. W. Burton, A. G. Porter, B. Harrison, and C. C. Hines, for appellees.

OSBORN, J.—This was an action brought by the appellee against the appellants for malpractice.

The complaint consists of three paragraphs.

The first alleges that the appellants were practising physicians and surgeons, and as such were called on by Thomas Crossan, a boy of the age of ten years, the child and servant of the appellee, and requested to set his broken arm, which he then had; that they pretended to do so; that they did it unskilfully, negligently, and unprofessionally, by reason whereof his arm became inflamed and to such an extent mortified that it necessarily had to be amputated.

The second avers that the appellants were physicians and surgeons, practising their profession as partners, and as such undertook and pretended to set the broken arm of Thomas Crossan, the child and servant of the appellee, of the age of

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ten years, at the request of the boy; that they attempted to set the arm in a skilful manner; that they did it in such a bungling, negligent, and unskilful manner that the arm mortified and had to be amputated.

The third charges that the appellee is the father of Thomas Crossan, an infant under the age of twenty-one years, and as such entitled to his services and society; that the appellants were practising physicians and surgeons, and as such were called on and requested, for a reasonable compensation, to see, examine, attend, cure, and heal his said son and servant, whose right arm was dislocated; that, in pursuance of such request, they agreed and undertook to set and cure the arm; that they did attempt to do so, but that they so negligently, unskilfully, and unprofessionally set, bandaged, and compressed the arm, and so negligently, unfaithfully, and unprofessionally neglected and refused thereafter to attend him in such sickness, and dress, adjust, cure, and heal the broken arm, that amputation became necessary to save his life, and by reason of such careless, etc., it was necessarily amputated.

A separate demurrer was filed to each of the paragraphs of the complaint and overruled, to which exceptions were taken. An answer of two paragraphs was then filed. The first was the general denial. The second alleged that the injury complained of was caused by the negligence of the plaintiff and his said infant son, and not the unskilfulness and neglect of the appellants. After an unsuccessful motion to strike out the second paragraph of the answer, the appellee filed a reply of general denial. The cause was tried by a jury, resulting in a verdict of four hundred and fifty dollars. The appellants filed a motion for a new trial, which was overruled, and judgment was rendered on the verdict. Exceptions were taken and thirty days time given to file a bill of exceptions. The bill was not filed within the time allowed.

The errors assigned are: 1st. In overruling the several demurrers to the complaint. 2d. In overruling the motion for a new trial.

It is claimed that the complaint is bad, because it fails to allege that the amputation of the arm became necessary without the fault of the appellee or the boy. We are referred to several cases, where it has been held that in a certain class of actions for an injury to the person, caused by the negligence of another, it must appear from the complaint, by express averment, that the plaintiff was without fault, or it must clearly appear, from the facts alleged, that such was the case. *The Toledo, etc., Railway Co. v. Bevin*, 26 Ind. 443; *The Evansville, etc., Railroad Co. v. Dexter*, 24 Ind. 411. *The Indianapolis, etc., R. R. Co. v. Keeley's Adm'r*, 23 Ind. 133. In this class of suits the plaintiff is required, as a general proposition, to prove that the immediate cause of the injury complained of was the wrongful act of the defendant, to which his own wrongful act did not immediately contribute. Hence, it has been held that the complaint must show by averments that he was not in fault. *The Evansville, etc., Railroad Co. v. Hiatt*, 17 Ind. 102.

In this case the allegations are, that the appellants were practising physicians and surgeons, and as such undertook to set a broken arm of the infant son of the appellee; that by reason of their unskilfulness, negligence, and want of care in treating the broken arm, it inflamed and mortified and had to be amputated. We think the averments sufficient to show that the appellee and his injured son were without fault, and that their negligence did not contribute to the result. *The Michigan Southern, etc., Railroad Co. v. Lantz*, 28 Ind. 528. It seems to us that, on principle, generally, where the complaint, as in this case, shows what the defendant did, that his negligent and wrongful acts caused the injury complained of, it sufficiently appears that the plaintiff is without fault. The allegation that the injury was caused by the want of professional skill and care of the appellants is not sustained, if it appear that the negligence of the appellee or his son, whose arm was broken, contributed to it. That averment must be proved before the plain-

Scudder *et al.* v. Crossan.

tiff is entitled to a verdict. See *Railroad Co. v. Glamon*, 15 Wal. 401.

“Proof of the commission by the defendant, or his servants, of the injury of which the plaintiff complains, very generally carries with it *prima facie* proof of negligence, and it is for the defendant to show that the injury was the result of inevitable accident, or that it was occasioned by the negligence or misconduct of the plaintiff himself.” Addison Torts, 400. “Contributory negligence on the part of the plaintiff, who complains that he has been damnified by the negligence of the defendant, is in general an answer to the action, on the ground that a man can not complain of that which he has himself helped to bring about.” *Id.* 18.

The appellants also object to the third paragraph of the complaint, because it does not state with whom the contract to set the broken arm was made, or who employed the appellants. The allegation was, that the appellants were physicians and surgeons, and as such were called on and requested, for a reasonable compensation, to set a broken arm of the son of the appellee; that in pursuance of that request, they undertook to set and cure the arm. “In the construction of a pleading for the purpose of determining its effects, its allegations shall be liberally construed with a view to substantial justice between the parties; but when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defence is not apparent, the court may require the pleading to be made definite and certain by amendment.” Sec. 90, 2 G. & H. 112. If it was uncertain who requested the appellants to render the service, or with whom the contract was made, the defect could be reached by motion to make more certain, and not in this case by demurrer. The nature of the charge was not uncertain. The appellants have cited no authority in support of the last objection. We think the averment sufficient. 1 Chitty Pl. 384.

The bill of exceptions, not having been filed within the time allowed by the court, is not properly in the record, and consequently no question arising on the motion for a new trial

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is before us. *Port v. Russell*, 36 Ind. 60; *Byers v. Hickman*, 36 Ind. 359.

The judgment is affirmed, with costs.

THE CITY OF GREENCASTLE v. ALLEN.

CITY.—*Liability for Street Improvement.*—Where a city organized and acting under our general law makes a contract for the improvement of a street at the expense of the property holders, and the contractor does the work in whole or in part, and the engineer refuses to make an estimate, and the council refuses to issue precepts upon the proper application against the property holders, a suit cannot be maintained by the contractor against the city for damages.

SAME.—*Mandate.*—The remedy in such case is by mandate to compel the engineer and council to perform their duties.

From the Putnam Common Pleas.

S. Turman and *J. Birch*, for appellant.

S. Claypool, for appellee.

PETTIT, J.—This suit was brought by the appellee against the appellant, and the only question that need be decided is this: If a city, organized and acting under our general law for that purpose, makes a contract for the improvement of a street at the expense of the property holders on the street, and the contractor does the work in whole or in part, and the engineer refuses to make an estimate, and the council refuses to issue precepts upon proper application against the property holders on the street, can a suit be maintained by the contractor against the city for damages in money? We answer this question in the negative, and cite, without copying, the following authorities: Acts 1867, p. 66, sec. 69, expressly enacts that in such case "the city shall be liable to the contractors for so much thereof only as is occupied by

The City of Greencastle v. Allen.

public grounds of the city bordering thereon, and the crossings of streets and alleys."

This provision would seem to be very conclusive in itself of the question, but there are many authorities bearing thereon, or directly in point, a few of which we will cite: *Gedney v. The Inhabitants of Tewksbury*, 3 Mass. 307; *Sedgwick Statutory & Constitutional Law*, 402; *City of Boston v. Shaw*, 1 Met. 130; *Lang v. Scott*, 1 Blackf. 405; *Johnson v. The City of Indianapolis*, 16 Ind. 227; *The City of New Albany v. Sweeney*, 13 Ind. 245; *The City of Indianapolis v. Imberry*, 17 Ind. 175; *Flourney v. The City of Jeffersonville*, 17 Ind. 169; *The City of New Albany v. Cook*, 29 Ind. 220.

It may be asked, had the contractor no remedy? We answer, yes. It was by mandate, to compel the engineer and council to do and perform their respective duties. 1 Ind. 72; 2 Ind. 527; 11 Ind. 205; *People v. Supervisors of Columbia Co.*, 10 Wend. 363; *Boyce v. Supervisors of Cayuga*, 20 Barb. 294; *People v. Supervisors of St. Lawrence*, 5 Cow. 292; *Huntington v. Smith*, 25 Ind. 484; *Chapin v. Osborn*, 29 Ind. 99; *Martin v. Mayor, etc., of Brooklyn*, 1 Hill N. Y. 545. The complaint was in two paragraphs, but they are substantially and to all legal effect the same, and the question stated in the forepart of this opinion covers and extends to all parts of both paragraphs of the complaint. A demurrer for want of sufficient facts to each paragraph was overruled and exception taken. This was error. Neither of the paragraphs of the complaint entitled the plaintiff to recover against the city.

The judgment is in all things reversed, at the costs of the appellee, with instructions to sustain the demurrers to both paragraphs of the complaint.

Burdge v. Lewis.

BURDGE v. LEWIS.

PRACTICE.—*Supreme Court.—Demurrer.*—Where no demurrer is in the record, this court cannot say that any was filed assigning as cause that the complaint does not state facts sufficient to constitute a cause of action.

SAME.—*Weight of Evidence.*—A judgment will not be reversed simply because the verdict was against the weight of evidence.

SAME.—*Motion for New Trial.*—A motion for a new trial, on the ground that the court erred in admitting evidence offered by the plaintiff over the defendant's objection, is too indefinite to raise any question for review.

From the Wabash Circuit Court.

J. U. Pettit and A. Taylor, for appellant.

J. D. Conner, for appellee.

WORDEN, J.—This was an action by the appellee against the appellant, to quiet the plaintiff's alleged title to certain real estate. The defendant answered by general denial, and by way of counter-claim setting up title in himself. Issue, trial, verdict and judgment for the plaintiff.

The defendant below appeals. We will consider the grounds relied upon in his brief for a reversal. It is insisted that a demurrer to the complaint should have been sustained. The complaint seems to have consisted of three paragraphs, but the plaintiff dismissed the first and second. The third was twice amended, and after the second amendment the record recites that "the defendant now files his demurrer to the third paragraph of the plaintiff's complaint in these words (not on file), which demurrer the court overruled, to which ruling the defendant excepts." There being no demurrer in the record to the pleading as finally amended, we cannot say that any was filed assigning as cause that the pleading did not state facts sufficient to constitute a cause of action. But if the pleading failed to state such facts, the defect was not waived by a failure to demur for that cause. There is, however, no assignment of error that in any way questions the sufficiency of the complaint. No question, therefore, as to the sufficiency of the facts alleged in the complaint is properly before us.

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It is said in the brief of counsel for the appellant, secondly, that "the finding of the jury is against the weight of the evidence." This may be, and yet we believe no case can be found where a judgment has been reversed in this court simply because the verdict was against the weight of the evidence. We pass to the next point.

It is urged, in the third place, that the court below erred in receiving, over the objection of the appellant, the testimony of William McCrea and David B. Patterson. These witnesses were examined, and to some portions of their evidence objection seems to have been made and overruled, but the record does not show what or whether any ground of objection was pointed out. Besides this, the motion for a new trial would seem to be too vague and indefinite to raise any question in this respect. On this point it is as follows:

"6. The court erred in admitting evidence offered by the plaintiff over defendant's objection." What evidence, or the evidence of what witnesses, was offered, was not specified or in any manner pointed out.

It is claimed, in the fourth place, that "the court below erred in pronouncing its judgment on the verdict in favor of plaintiff, when it should have been in favor of the defendant." No particular reason is pointed out why the judgment should not regularly follow the verdict.

In the fifth and last place, it is urged that there was error in "giving judgment in favor of the plaintiff and against defendant for all costs, when it should have been in favor of the defendant against the plaintiff." The last two objections seem to be urged upon the theory that the complaint was bad for the want of a statement of sufficient facts; but we have already seen that no question in this respect is legitimately before us. There is no error in the record.

The judgment below is affirmed, with costs.

Stone v. McKinney et ux.

STONE v. MCKINNEY ET UX.

BILL OF EXCEPTIONS.—A bill of exceptions filed after the expiration of the time given within which to file the same does not become a part of the record.

From the Warrick Circuit Court.

C. Denby, I. S. Moore, and D. B. Kumler, for appellant.

L. Q. DeBruler, C. A. DeBruler, W. F. Parrett, and R. S. Hicks, for appellees.

BUSKIRK, J.—This was an action brought by Stone against McKinney and wife, to recover the amount of a note payable by McKinney to Stone, and the foreclosure of a mortgage given by McKinney and wife to secure the payment of the note.

The defendants in their answer admitted the execution of the note and mortgage and pleaded by way of a set-off, that in the year 1868, McKinney and Stone entered into a co-partnership in the purchase and sale of tobacco, to last for one year; that by the terms of the co-partnership, McKinney was to purchase the tobacco, prize it, and fit it for market, and Stone was then to take charge of it and ship and sell; The profits and loss to be equally divided; that in pursuance of the co-partnership, McKinney purchased and prepared for market two hundred and forty-seven thousand pounds of tobacco and turned it over to Stone for shipment and sale; that Stone received, as net profits upon the transaction, ten thousand dollars, but accounted to McKinney for three thousand five hundred only, and settled with him upon that basis of profit; and that to equalize the accounts of the co-partnership upon the settlement, McKinney gave Stone the note sued upon in this action, he, McKinney, not knowing at the time the amount of profits realized by Stone, and believing his representations as to the amount to be true. He offers to set off the amount due him from Stone on account of the partnership against the note, and asks for judgment for the residue.

Stone v. McKinney et ux.

There was a reply in denial and trial by jury resulting in a verdict in favor of the defendants as to the plaintiff's cause of action, and a finding in favor of McKinney, and against the plaintiff, upon the set-off, in the sum of three hundred and thirty-two dollars and forty-five cents.

The plaintiff moved for a new trial, assigning therefor the following causes:

1. That the verdict is contrary to law.
2. That it is contrary to the evidence.
3. That the damages are excessive.
4. That the court erred in permitting the testimony of Miller hereinbefore set out to be given.
5. That the court erred in refusing the first instruction asked by appellant.
6. That the court erred in refusing to give the third instruction asked by the appellant.
7. That the court erred in refusing to give the fifth instruction asked by appellant.
8. That the court erred in refusing to give the sixth instruction asked by appellant.
9. That the court erred in not reducing instructions given in writing.
10. The same as ninth.

The error relied upon for a reversal of the judgment is the overruling of the motion for a new trial.

Counsel for appellees have filed a supplemental brief, in which the point is made and insisted upon that the evidence is not in the record, and that consequently no question is presented for our decision.

The judgment was rendered on the —— day of March, 1871. Sixty days were granted in which to file a bill of exceptions. The bill was signed by the judge on the —— day of May, 1871. It affirmatively appears by the record that it was not filed until the 9th day of September, 1871, which was nearly four months after the time limited by the court.

An examination of the causes for a new trial will show

Rose v. Balfé et al.

that no question arises in the record for our decision, in the absence of the evidence. There is one general bill of exceptions intended to embrace all the questions in the case, and it would have done so, if it had been filed in time. The questions mainly discussed and relied upon were, the admission of incompetent evidence, and the refusal of the court to give proper instructions. The bill of exceptions not being in the record, we have no means of knowing what evidence was improperly admitted, or what instructions were wrongfully refused.

The judgment is affirmed, with costs.

ROSE v. BALFE ET AL.

From the Tippecanoe Common Pleas.

W. C. L. Taylor, E. A. Greenlee, and W. C. Wilson, for appellant.

J. R. Coffroth and T. B. Ward, for appellees.

DOWNEY, C. J.—The questions in this case are the same as those in *Ball v. Balfé*, 41 Ind. 221; and for the reason there given, the judgment in this case should be affirmed.

The judgment is affirmed, with costs.

The Ft. Wayne, Muncie, and Cincinnati R. R. Co. *v.* Hinebaugh *et al.*

THE FORT WAYNE, MUNCIE, AND CINCINNATI R. R. Co. *v.*
HINEBAUGH ET AL.

RAILROAD.—*Killing Animals.*—*Parties.*—Under the statute, the company owning a railroad is liable for stock killed by a train on such road, without reference to the company or persons who may have been running the locomotive or cars that caused the injury; and such company owning the road may be sued alone.

From the Fayette Common Pleas.

W. H. Coombs, W. H. H. Miller, R. C. Bell, and B. F. Claypool, for appellant.

A. P. Stanton, J. R. Troxell, and W. R. Manlove, for appellees.

DOWNEY, C. J.—The complaint in this case, by the appellees against the appellant, was in several paragraphs, for the killing of stock, at different times, belonging to the plaintiffs, by the defendant, at a point on its road where the road was not securely fenced in, etc. The action was commenced before a justice of the peace, where there was judgment, by default, for the plaintiffs. The defendant appealed to the common pleas, where, upon a trial by the court, there was judgment for the plaintiffs for the same amount as before the justice of the peace. A motion for a new trial was made and overruled, and the defendant excepted. Error is assigned upon this ruling alone.

The case turns upon the sufficiency of the evidence, which consists of an agreement of certain facts by the parties, and the testimony of one witness in addition thereto, and establishes the following facts: That the stock was killed in July and August, 1870, in Fayette county, on the road built by The Connersville and New Castle Junction Railroad Company; that the road was not securely fenced at the point where the stock was killed; that, on the 9th day of June, 1869, The Connersville and New Castle Junction Railroad Company and The Fort Wayne, Muncie, and Cincinnati Railroad Company, the latter road not being then construct-

The Ft. Wayne, Muncie, and Cincinnati R. R. Co. *v.* Hinebaugh *et al.*

ed, consolidated and became a corporation by the name of The Fort Wayne, Muncie, and Cincinnati Railroad Company, and on the same day said consolidated company leased its road to the Junction railroad company for ninety-nine years; that the said road was operated by the Junction railroad company, and all the business of the line done by that company; and it was shown that the value of the stock killed was the amount for which judgment was rendered.

The ground relied upon by the appellant for a reversal of the judgment is, that the appellant was not liable for the stock when the road was being run and controlled by the Junction railroad company, a lessee of the appellant.

The first section of the statute declares, "that lessees, assignees, receivers, and other persons, running or controlling any railroad, in the corporate name of such company, shall be liable, jointly or severally with such company, for stock killed or injured by the locomotives, cars, or other carriages of such company, to the extent and according to the provisions of this act." The second section provides, "that whenever any animal or animals shall be or shall have been killed or injured by the locomotives, cars or other carriages used on any railroad in, or running into or through this State, whether the same may be or may have been run and controlled by the company, or by the lessee, assignee, receiver or other person, the owner thereof may go before some justice of the peace," etc.

The fourth section authorizes the action to be brought against the railroad as defendant, whether the same is or was being run by the company, or by a lessee, assignee, receiver or other person in the name of such company. See 3 Ind. Stat. 413.

The action here is not against the lessee of the road, nor is it against the company owning the road and the company running the road as lessee jointly, but it is against the company owning the road, seeking to make it severally liable for the animals killed. We are unable to see why the action is not properly brought against that company. The act seems

Gardner v. Stover.

to render the company owning the road liable without reference to the company or person who may have been running the locomotives, cars, etc. It is conceded by counsel for appellant that this is the construction given to the act in question by this court in *The Indianapolis, etc., R. R. Co. v. Solomon*, 23 Ind. 534. But it is insisted that that case should not be followed. We think that case was correctly decided, and that it must guide us in the determination of this one.

The judgment is affirmed, with five per cent. damages and costs.

GARDNER v. STOVER.

PRACTICE.—*Supreme Court.—Brief.*—A brief, within the meaning of rule 14 of the Supreme Court, is a statement of the case for the information of the court. It should purport to furnish the court some aid in deciding the case, and should attempt to show why the judgment ought to be reversed or affirmed.

SAME.—To say that counsel cannot discuss the reasons upon which the court below decided the case and that the question is upon the sufficiency of the complaint, is not a brief.

From the Montgomery Common Pleas.

P. W. Bartholomew, S. C. Willson, and L. B. Willson, for appellant.

OSBORN, J.—This appeal was submitted on the 28th day of May, 1873. No brief has been filed as required by rule 14. A paper called a brief was filed on the 8th day of June, of which the following is a copy :

“Appellant cannot in this cause discuss the reasons upon which the court below sustained the demurrer to the complaint, for the reason that the court below did not announce the reasons. The only question is, Is the appellant's complaint sufficient upon which to base his action? The demurrer, of course, admits the facts stated as true.”

Cromwell v. Baty.

In *Deford v. Urbain*, 42 Ind. 476, this court dismissed an appeal for failing to comply with the above rule. The paper filed in that case was about as explicit as in this. In that case the paper did not purport to contain any statement of the case, or to furnish the court any information.

Tidd says a brief should contain an abstract of the pleadings; a statement of the facts of the case, with such observations as occur thereon. The great rule to be observed in drawing briefs consists in conciseness with perspicuity. Tidd Pr. 799. "A detailed statement of a party's case." Bouv. Law Dict. "An abridgment of a plaintiff's or defendant's case, prepared by his attorney, for the instruction of counsel on a trial at law." Burrill Law Dict.

A brief, within the meaning of rule 14, is some kind of a statement of the case for the information of the court. We will not say that it should be as full as required by an attorney to counsel. Still, it should at least, purport to furnish the court some information; some aid in deciding the case. An attempt should be made to show why the judgment of the court below should be reversed or affirmed.

To say that counsel cannot discuss the reasons upon which the court below decided the case, or to notify the court that the question is upon the sufficiency of the complaint, without making any suggestion, or citing any authority, as in this case, does not purport to be a statement for the information of the court. It is no better than a blank sheet.

The appeal is dismissed, with costs.

CROMWELL v. BATY.

SUPREME COURT.—*Waiver of Objection*.—In a cause appealed from a justice of the peace, if the parties appeared in the court to which the appeal was

Cromwell v. Baty.

taken and went to trial without objection, an objection that no transcript of the proceedings before the justice was filed in the court below cannot for the first time be made in the Supreme Court.

From the Jefferson Common Pleas.

H. W. Harrington and C. A. Korbly, for appellant.

OSBORN, J.—This was an action instituted by the appellee against the appellant, to recover the balance due for building a new house and repairing an old one, and for work and labor.

An answer was filed, consisting of three paragraphs. The complaint and answer purported to have been filed before a justice of the peace. The clerk recites that a transcript was filed on a day named, and that the complaint and answer set out in the record were filed with the transcript. No transcript appears in the record, and the clerk states that it has been misplaced. We presume the case was appealed by one of the parties. They both appeared in the common pleas, where the issues were tried by a jury, who rendered a verdict for the appellee for two hundred dollars, and over a motion for a new trial, judgment was rendered on the verdict.

The errors assigned are, 1st. In overruling the motion for a new trial; and, 2d. The court has no jurisdiction of the cause, because there was no transcript from the justice of the peace.

There is no bill of exceptions in the record, showing any error in overruling the motion for a new trial. The appellant made no motion to dismiss the appeal for want of a transcript, but appeared to the action in the common pleas court, and went to trial on the pleadings. It is too late to raise the question of the want of a transcript of the proceedings before the justice of the peace for the first time in this court.

The court had jurisdiction of the parties as well as of the subject-matter of the cause of action.

The judgment of the said Jefferson Common Pleas is affirmed, with costs.

SNELL v. THE STATE, EX REL. KELLER ET AL.

43 359
163 411

SHERIFF.—*Overpayment to.*—An overpayment to a sheriff on an execution, under a threat to levy if the sum demanded be not paid, is not a voluntary payment, but money obtained by the sheriff “by virtue of his office;” and in a suit on his official bond to recover such overpayment, his sureties are liable.

MOTION FOR NEW TRIAL.—*Demurrer.*—Error in overruling a demurrer is not a cause for a new trial.

SHERIFF.—*Deputy.*—What a sheriff does by his deputy he does himself, and he is responsible for money paid to such deputy as if paid to himself in person.

SAME.—*Bond.*—A sheriff’s bond is several as well as joint; and in a suit thereon against him and his sureties, although the court might render judgment against him and his sureties, yet that judgment has been rendered against him alone is no reason for reversing it on an appeal by said sheriff, neither the plaintiff nor the sureties complaining of the action of the court below.

From the Madison Common Pleas.

J. W. Sansberry and *E. B. Goodykoontz*, for appellant.

C. D. Thompson and *J. T. Smith*, for appellees.

DOWNEY, C. J.—This was an action by the appellee against Snell, as sheriff of Madison county, and the sureties on his official bond as such sheriff. After alleging the execution of the bond, etc., it is stated that an execution and decree were issued and placed in the hands of the sheriff for collection against the property of the relators; that prior to the 7th day of August, 1868, they had paid on the same the sum of sixteen hundred and forty dollars; and that on that day the sheriff demanded of them the further sum of three hundred and fifty dollars, which he represented as the amount necessary to pay off the balance of the execution, and then and there threatened to seize the property of the relators, if said sum was not paid; and that the relator Keller, not knowing the amount due on the execution, under the statement of the sheriff that said sum was due, and in order to save his property from seizure on said execution, then and there paid said sum, when in truth and in fact only one hundred dollars were due, making two hundred and fifty dollars that he was illegally, unjustly, and forcibly compelled to pay, etc.

Snell v. The State, ex rel. Keller et al.

It is then alleged that as soon as the error was ascertained, and before this action was brought, the amount so overpaid was demanded of said sheriff, and that he refused and failed to pay the same or any part of it, etc. ; wherefore, etc.

The first question presented is as to the sufficiency of the complaint. The common pleas held it sufficient. It is urged by counsel for the appellant, that the complaint does not show any sufficient compulsion by the sheriff to justify the payment to him officially. It is claimed that the complaint shows that the sheriff had a copy of a decree in a suit foreclosing a mortgage, and that all that the sheriff could do was to sell the mortgaged premises, and that he could not seize any other property, and that hence the payment was a voluntary one, for which the sheriff would not be liable, at least on his official bond. This is a misapprehension of counsel. The complaint describes a writ by which the sheriff was commanded "to make the sum of one thousand seven hundred and seventy dollars and ninety-five cents, principal, interest, and costs, and his accruing costs, out of the property of said Phillip A. Keller." As the facts do not exist upon which the objection is based, we suppose we need not any further consider it.

Another objection made is, that the terms of the bond, and the liability of the parties thereto do not extend to such cases ; that at the time of the execution of the bond, it was not expected or contemplated that the sheriff would receive from parties more than was due from them ; that the bond was not for the purpose of securing the repayment of money so paid ; and that the non-payment of money so received would be no breach of the bond. This would be a very narrow and unreasonable construction to put upon the bond. The sheriff got the money by virtue of his office. He had no right to keep it. Justice and honesty required him to repay it. By the express terms of his bond, he agreed that he would "faithfully discharge the duties of the office of sheriff of said county of Madison, according to law, and safely keep and pay over according to law, to the proper

person, all moneys which may come into his hands by virtue of his said office." We hold that such a payment of money comes clearly within the terms of the bond, and within the spirit of the law requiring such bonds to be given. We think there is no valid objection to the complaint.

The defendants answered by a general denial, and they also in a second paragraph pleaded payment of the amount by the principal in the bond. To the second paragraph there was a reply in denial. The court, by agreement of the parties, tried the cause, without the interposition of a jury, and found in favor of the sureties, and against the principal in the bond. A motion for a new trial was made by the principal and overruled, and final judgment was rendered for the plaintiff as to him on the finding.

The second error assigned is the refusal of the court to grant a new trial. The first reason for a new trial is, that the court erred in overruling the defendant's demurrer to the complaint. This is no cause for a new trial. The second, third, and fourth reasons are, the insufficiency of the evidence to support the finding, and that the finding is contrary to law.

We think the evidence sufficient to sustain the finding of the court, and do not see wherein it is contrary to law.

The execution given in evidence is in the common form of a *fieri facias*, against the judgment defendant and replevin bail. The receipt given is as follows:

"Received, Hartsville, August 7th, 1868, of Phillip A. Keller three hundred and fifty dollars, on an execution in favor of Samuel Johnson *et al.* against him.

"J. H. SNELL, S. M. C.
"per W. ROACH, Deputy."

What a sheriff does by his deputy he does himself. The defendant cannot be allowed to say that he is not responsible, because the money was paid to his deputy instead of having been paid to him in person.

That the judgment was rendered against Snell alone is no reason for reversing it. The bond was several as well as

Hedrick v. Kramer.

joint, and while we think the court might well have found and rendered judgment against the securities as well as the principal, we need not reverse the judgment on this ground. Neither the plaintiff nor the sureties are complaining of this action of the court. Had the judgment been against the principal and sureties, the property of the principal would have been first liable to sale on the execution. 2 G. & H. 233, sec. 416. He could derive no advantage from having the sureties included with him in the judgment.

The judgment is affirmed, with eight per cent. damages and costs.

HEDRICK v. KRAMER.

43	369
125	461

43	362
171	377

COSTS.—Superior Courts.—Under the act providing for the organization of the Superior Court (Acts 1871, p. 48), the same rules of law in reference to costs prevail as in the circuit court.

From the Marion Superior Court.

G. W. Spahr and *H. Daily*, for appellant.

W. W. Woollen, Jr., and *J. H. Ruddell*, for appellee.

WORDEN, J.—This was an action by the appellant against the appellee, on contract. The plaintiff below recovered a judgment against the defendant for thirty dollars; and on motion of the defendant, the latter recovered a judgment against the plaintiff for his costs in the cause. The plaintiff excepted as to the judgment for costs. On appeal to general term, the judgment rendered at special term was affirmed.

The correctness of the judgment for costs is questioned in this court.

“In actions for money demands on contract, commenced in the circuit court or court of common pleas, if the plaintiff recover less than fifty dollars, exclusive of costs, he shall

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pay costs, unless the judgment has been reduced below fifty dollars by a set-off or counter-claim, pleaded and proved by the defendant, in which case the party recovering judgment shall recover costs. When the judgment is reduced below fifty dollars by proof of payments, the defendant shall recover costs." 2 G. & H. 227, sec. 397. The judgment in the cause was not reduced below fifty dollars by set-off or counter-claim; hence the defendant was entitled to costs, if the above statute controls. At the time of the passage of the above statute, the Marion Superior Court had no existence. The object of the statute was to require actions upon contract, where there was less than fifty dollars due the plaintiff, without reduction by set-off or counter-claim, to be brought before justices of the peace; or if brought in either of the courts of record, that the plaintiff should pay costs as a kind of penalty for bringing his case there and encumbering those courts with small and unimportant business, over which justices had ample jurisdiction.

The act establishing the Superior Court (Acts 1871, p. 48) gives it original concurrent jurisdiction with the circuit court and court of common pleas, in all civil causes except slander, and except causes of which the court of common pleas has exclusive original jurisdiction, and appellate jurisdiction concurrent with the circuit court and court of common pleas in all appeals from justices, etc. It has a seal and is declared to be a court of record and of general jurisdiction, whose judgments, etc., shall have the same force and effect, and be enforced in the same manner, as those of the circuit court. It has power to issue and direct process to courts of inferior jurisdiction, and to corporations and individuals, which shall be necessary in exercising the jurisdiction conferred, and for the regular execution of the law, and to make all proper judgments, sentences, decrees, orders, and injunctions, and to do such other acts as may be necessary to carry the same into effect, in conformity with the constitution and laws of the State.

The clerk of the circuit court and the sheriff of the

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county are made the clerk and sheriff of the superior court, and are required to perform the same duties as in the circuit and common pleas courts. An appeal is allowed from the judgments of the court rendered at general term to the Supreme Court, in all cases where an appeal is allowed to the latter court from the judgment of the circuit court. The superior court may be inferior to the circuit court in a constitutional sense, but the whole act providing for its organization very clearly evinces a legislative intent that it should have, with the exceptions above stated, the jurisdiction and perform the functions of the circuit and common pleas courts.

There is, however, no express provision in the act providing for the organization of the superior court on the subject of the recovery of costs in that court. But we take it to be clearly implied that the same principles of law, and the same mode of procedure, shall prevail in that court, unless the contrary be expressed, that obtain in the circuit or common pleas court. And this applies to costs as well as in other respects. Says Chancellor KENT: "When the words are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the objects and the remedy in view; and the intention is to be taken or presumed, according to what is consonant to reason and good discretion. These rules, by which the sages of the law, according to Plowden, have ever been guided in seeking for the intention of the legislature, are maxims of sound interpretation, which have been accumulated by the experience, and ratified by the approbation of ages." 1 Kent Com. 462.

The necessity of the law grew out of the crowded condition of the dockets of the circuit and common pleas courts, and the inability of the judges of those courts to transact the rapidly accumulating business thereof. The remedy provided was the organization of another court, with nearly the same jurisdiction and powers, by which a part of the business, which would otherwise be necessarily delayed in

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the circuit and common pleas courts, might be despatched.

The object was not to relieve justices of the peace from any supposed press of business upon their dockets, nor to assimilate the court thus provided for to courts of justices of the peace. Nor do we think it was the intention of the legislature that the superior court should, at the option of a party, be made the forum for the adjustment of demands under fifty dollars, except upon the same terms as are imposed upon a plaintiff when suing in the common pleas or circuit court. In other words, we are of opinion that the same law, in this respect, applies to the superior court, that governs in the other courts. This is inferred from the object and spirit of the law; and, as was said by Chief Justice MARSHALL, in the case of *Durousseau v. The United States*, 6 Cranch, 307, "The spirit as well as the letter of a statute must be respected, and where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent."

The judgment below is affirmed, with costs.

DOWNEY, C. J.—I cannot assent to the foregoing opinion. The general statutory rule is, that in all civil actions the party recovering judgment shall recover costs, except in those cases in which a different provision is made by law. 2 G. & H. 225, sec. 396. The section relied upon as creating the exception in this case is section 397, set out in the opinion of the majority of the court. That section, however, by its own terms, is confined to cases "commenced in the circuit court or court of common pleas." This is not a case for the construction or interpretation of language; for there is no language concerning the recovery of costs in the superior court to be construed or interpreted, as it is conceded that the act relating to that court contains nothing on the subject. The legislature has supplied the omission in the act creating the superior court, by the act of March 3d, 1873, but that act cannot apply to this case, which was disposed of before its enactment. Acts 1873, p. 105.

Nudd *et al.* v. Holloway.

NUDD ET AL. v. HOLLOWAY.

PRACTICE.—*Bill of Exceptions.*—If a party seeks to take advantage of a ruling in admitting, refusing to admit, or striking out, or refusing to strike out evidence, the evidence concerning which the ruling has been made must be presented in the record.

From the Henry Circuit Court.

G. A. Johnson, for appellants.

J. Brown and *R. L. Polk*, for appellee.

PETTIT, J.—This suit was brought by the appellants against the appellee, on two promissory notes not made payable to the plaintiffs, but which had been legally transferred to them by one Warren, who had been legal holder and owner of them, and who, some years before, had been the partner in business of Holloway, the defendant. The only paragraph of the answer that need be noticed is that of set-off, which was pleaded for debts and liabilities of Warren, while he was the owner of the notes, to the defendant, Holloway. Proper reply to the answer, trial by jury, verdict for defendant. Motion by plaintiffs for new trial overruled, exception taken, and judgment on the verdict. The bill of exceptions shows the following state of facts, which present the only question before us, the evidence not being in the record, and no question being raised on the pleadings.

“Be it remembered that on the trial of this cause, the defendant, to sustain the issue made by his answers, introduced in evidence certain partnership books, papers, and accounts between Lewin Warren and said defendant, formerly firm of Holloway & Warren, and the cross-examination of said defendant, Holloway, tended to show that the foregoing were not all the partnership books, papers, and accounts existing between said Holloway and Warren; and thereupon it was admitted by counsel on both sides that a certain agreement had been executed between them dispensing with a bill of particulars of defendant's claims set up in his answer, on certain conditions.

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“Nudd and Myers v. Holloway. It is agreed by and between the parties in this case that a bill of particulars is waived, and all matters are to be given in evidence by the defendant as if he had a proper bill of particulars filed under any and all of his pleadings, on condition that the partnership books, accounts, and papers now in possession of the defendant are to be delivered to T. B. Redding, one of the plaintiffs' attorneys, by the leaving of the four o'clock train from this place to Cambridge City, on the evening of the 14th inst., in time to forward them by said train to G. A. Johnson.’

“And thereupon plaintiffs move the court to exclude from the jury and strike out from the evidence which had been introduced so many of the partnership books, papers, and accounts as had been introduced in evidence by the defendant, on the ground that the evidence showed on cross-examination of said Holloway, that there were other partnership books, papers, and accounts, and the agreement contemplated that all the books, papers, and accounts existing between the said partners should be delivered over to plaintiffs' attorney, in consideration of plaintiffs' dispensing with the filing of a bill of particulars by defendant of the claims set up in his answer, but the court overruled said motion and refused to strike out said evidence, to which ruling the plaintiffs then and there excepted.”

The agreement was to deliver the partnership books, accounts, and papers *then* (“now”) in the possession of the defendant, and there is no showing that he did not comply with this agreement. The books, etc., which were discovered on cross-examination of the defendant may not have been in his possession at the time the agreement was made. Nor is it shown that their contents in the least referred to or affected the rights of any party in this suit. But the books, papers, etc., which were given in evidence, nor those which it seems were discovered to exist on cross-examination of the defendant, nor any part of their contents, are before us in the record. We cannot, therefore, see or say

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that those given or not given in evidence did or would have injured or benefited either party.

Hence we cannot say that either sustaining or overruling the motion to strike out was or would have been error. If a party seeks to take advantage of the ruling of the court below in admitting, refusing to admit, striking out, or refusing to strike out evidence, the evidence admitted, refused to be admitted, stricken out, or refused to be stricken out, must be presented to this court in the record, that we may be able to see that injury was done by the action of the court in its ruling.

The judgment is affirmed, at the costs of the appellants.

JEWETT ET AL. v. PLEAK ET AL.

CONTRACT.—*Novation.*—If A. takes the note of B. for the debt of C., it is an extinguishment of the debt of C. if so agreed by the parties.

PRACTICE.—*Bill of Exceptions.*—The action of a court in ruling upon a motion for a new trial, for reasons relating to evidence improperly admitted or rejected, newly-discovered evidence, or the weight and legal effect of evidence, is not properly presented for review unless the evidence is in the record by a bill of exceptions.

From the Decatur Circuit Court.

J. Gavin, for appellants.

W. Cumbach, S. A. Bonner, J. S. Scobey, and O. B. Scobey, for appellees.

PERTIT, J.—This suit was brought by the appellants, Jewett and eleven others, against Preston Jones, Joseph D. Pleak, Edmund Marshall, George W. Hungate, and Andrew J. Hungate. The questions in the case here, however, only affect and are solely between the appellants who were plaintiffs below and the appellees, Pleak and Marshall, who were two of the defendants below. The transaction set out and

complained of in this case took place when there was not a bankrupt law of the United States in force, and when there was no law of the State forbidding a debtor in failing circumstances honestly to make an assignment for the benefit of preferred creditors.

The complaint, in substance, alleges that Preston Jones and Andrew J. Hungate were the owners of a large amount of property, both real and personal; that they had been extensive dealers and were in failing circumstances; that they made an assignment of all their property, real and personal, to Pleak and Marshall to pay preferred creditors fifty cents on the dollar, and other creditors thirty-three and one-third cents on the dollar; that at the date of the assignment the plaintiffs had legal claims against Jones and Hungate, and that subsequent to the assignment they severally put their claims into judgments and had not been able to collect the several amounts, though they had resorted to executions, etc., and praying that the assignment be held fraudulent and void, and that the property assigned be held liable for, and made applicable to, the payment of the judgments of the several plaintiffs, etc.

Omitting to notice a demurrer to this complaint and a motion to strike out many exhibits filed with it which were not properly parts thereof, we will pass to the real questions presented.

The answer of Pleak and Marshall, the assignees, was in four paragraphs; 1st. General denial. 2d. Payment of the plaintiffs' claims. "3d. That heretofore, to wit, before the commencement of this action, they had a general accounting and settlement with each of said plaintiffs, wherein the matters in controversy were duly considered and ascertained, and thereupon they executed their notes to each of the plaintiffs for an amount agreed upon, which said notes were by them severally received in full satisfaction of their individual claims mentioned in the complaint." The fourth paragraph of the answer is very long, reciting at great length,

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and with great particularity, all the transactions and history of the case, and concludes as follows: "That the purchase of all of said assets by them was made in good faith on their part and was an absolute and unconditional purchase, and without any intent to defraud any of the other creditors of said Jones, or Jones and Hungate, and that said purchase was made for a valuable consideration, and for more than the actual worth of said assets." A demurrer to the third and fourth paragraphs of the answer, for want of sufficient facts, was overruled, and this ruling is assigned for error.

We hold that this ruling was not erroneous. The taking of a note of a third party is an extinguishment of the existing debt if so agreed by the parties. *Tyner v. Stoops*, 11 Ind. 22; *Stevens v. Anderson*, 30 Ind. 391; *Booth v. Smith*, 3 Wend. 66; *Boyd v. Hitchcock*, 20 Johns. 76; *Sheehy v. Mandeville*, 6 Cranch, 253-264; *Hughes v. Wheeler*, 8 Cowen, 77; *Tilford v. Roberts*, 8 Ind. 254. The authorities we have above cited principally relate to the sufficiency of the third paragraph, but we are fully satisfied that the fourth paragraph of the answer is also good. A reply of general denial was filed to these paragraphs of the answer; trial by the court, finding for the defendants. Motion for a new trial, for the reasons: "1. The finding of the court is contrary to law. 2. The finding of the court is contrary to evidence. 3. The court erred in the admission of evidence. 4. The court erred in refusing to admit proper and competent evidence offered by the plaintiffs. 5. Newly-discovered evidence material for the parties applying, which they could not with reasonable diligence have discovered and produced at the trial. 6. That the court improperly considered the deposition of George W. Sidner, when it was not admitted in evidence." This motion was properly overruled, as we are bound to suppose and hold, as there is no bill of exceptions legally or properly in the record before us.

The case was tried, and final judgment was rendered, at the July term, 1869. No time was asked or given to file a bill of exceptions after the term. The bill of exceptions was

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signed by the judge, and filed in the clerk's office, after the term at which the judgment was rendered. We cannot, therefore, consider any question arising or supposed to arise under it. This question has been so often decided by this court that we need not cite the cases.

The judgment is affirmed, at the costs of the appellants.

CARPENTER v. THE STATE.

INSTRUCTIONS TO JURY.—Where instructions state the law correctly, though they might have been fuller, they are not for that cause erroneous.

SAME.—Where evidence is offered by either party, to prove a certain state of facts, and the claim is made that they are proved, and the court is requested to charge the jury what the law is, as applicable to them, and what verdict to render if they find them proved, the court must comply with the request.

48	371
136	154
43	371
141	124
48	371
157	204
43	371
166	702

From the Morgan Circuit Court.

W. R. Harrison, W. S. Shirley, C. F. McNutt, and G. W. Grubbs, for appellant.

J. C. Denny, Attorney General, and *J. C. Robinson*, for the State.

OSBORN, J.—The appellant was indicted for murder in the second degree, tried by a jury and convicted of manslaughter, and on a motion for a new trial, sentenced to the state prison for nine years.

The error assigned is in overruling the motion for a new trial.

The causes for a new trial, as stated in the motion, are, that the verdict is contrary to the evidence; that the court erred in admitting illegal evidence and in rejecting legal and competent evidence during the trial; that the court erred in giving and in refusing to give instructions to the jury, and also for newly-discovered evidence.

The rulings of the court in admitting and refusing to admit evidence were not excepted to. The question of newly-discovered evidence is not pressed. Indeed, it seems to have

been only cumulative. The objections to the charges given are, principally, that they are not as clear as they should have been; that they do not state the law fully to the jury. The objection is not so much that the instructions given misstate the law, as that they fail to state it fully; that they are mere abstractions, and not so given as to enable the jury to understand and apply them to the evidence in the case.

The instructions given by the court are not erroneous. They state the law correctly, and whilst they might have been fuller, they are not for that cause erroneous.

The judge was careful not to give any unnecessary instruction, and not to usurp the province of the jury. If the appellant desired further instructions, he should have asked for them.

The third instruction asked by the appellant and refused by the court is as follows: "If you should find that Carpenter was standing, on the evening in question, in front of Miller's saloon; that while there he was assailed by the deceased or by persons who were associated and acting with him; that he was struck and pushed against the wall; that a pistol was drawn by one of the assailing party and thrust into his face and at his head; that he made no resistance, but retreated along the wall of the building and sought to avoid the difficulty; that he was followed up and crowded upon by his assailants; that the struggle and assault continued along the sidewalk for the distance of fifty feet, to the front of the livery stable; that there the striking and pushing continued; that all the blows seemed directed towards the defendant; that he was crowded upon, struck, and his hat knocked off; that he was so pressed that he called for help; that thus assailed and pressed, he disengaged himself from his pursuers and ran from his assailants; that he was followed and pursued by the deceased and others; that there were cries of, 'catch him,' 'shoot,' 'don't shoot,' and the like; that having run for the distance of one hundred feet, and being closely pressed by his pursuers, he turned and fired the fatal shot; and you should find that these circum-

stances were calculated to produce in his mind the reasonable apprehension that some great bodily harm was intended to him, and that he fired the fatal shot under such apprehension, then you should find that the defendant was justified, and should find him not guilty."

The instruction asked was applicable to the evidence in the case and, in our opinion, should have been given. If the facts stated in the instruction were found to be true, and the evidence set out in the bill of exceptions tends strongly to establish them, they justified the defendant in killing the deceased and entitled him to a verdict of acquittal; and the court ought to have so told the jury on being requested to do so by the prisoner. 1 Bishop Crim. Law, sec. 384; *Shorter v. The People*, 2 Comst. 193, and cases cited.

It is true the court had given instructions to the jury on that subject, in which the law had been correctly stated. They were merely general rules or declarations of general principles, stating nothing specific or specially applicable to the evidence before the jury.

It was a case in which the defendant had a right to demand something more than a declaration of general principles of law in a charge of the court to the jury. He was entitled to a specific charge, if requested, declaring the law applicable to the facts claimed to have been proven, and in relation to which material evidence had been introduced. *Morris v. Platt*, 32 Conn. 75. In that case on page 82, it is said: "Where evidence is offered by either party to prove a certain state of facts, and the claim is made that they are proved, and the court is requested to charge the jury what the law is as applicable to them, and what verdict to render if they find them proved, the court must comply." Whilst the failure to charge more specifically might not have been ground for a new trial in the absence of a request for a further charge, still, after the request was made, it was error to refuse it. The instructions were not as full and specific as the prisoner was entitled to. They did not mislead the jury, nor did they state to them all matters of law

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necessary for their information in giving their verdict. 2 G. & H. 417, sec. 113.

This renders it unnecessary for us to pass upon the question of the sufficiency of the evidence to sustain the verdict. We have, however, examined the evidence with much care, and are of the opinion that if the instruction had been given as asked, the jury might have rendered a verdict of acquittal.

The judgment of the said Morgan Circuit Court is reversed. The cause is remanded, with instructions to grant a new trial, and for further proceedings in accordance with this opinion.

The clerk is directed to give the proper notice to the warden of the state prison for the return of the prisoner.

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PROMISSORY NOTE.—Additional Surety.—Alteration.—Adding a name to a note as an additional surety, with the assent of the payee, and with the assent and at the request of the personal representative of the original surety, and with the agreement that the estate should not be released, was not such an alteration as would release the estate of the original surety.

From the Washington Common Pleas.

T. L. Collins and *A. B. Collins*, for appellant.

H. Heffren, *S. B. Voyles*, and *J. G. Lawler*, for appellee.

OSBORN, J.—This was an action by the appellant against the appellee as administrator, etc., of the estate of Daniel Voiles. A demurrer to the complaint for want of sufficient facts was sustained, to which an exception was taken.

The error assigned is in sustaining the demurrer to the complaint.

The allegations in the complaint show that on the 15th of

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December, 1862, John C. Voiles and Daniel Voiles gave their joint and several note to Robert Brown for five hundred and fifty-four dollars, payable one day after date. Daniel Voiles was surety for John C., who was appointed executor of his will. After his appointment, and while he was acting as such executor, Brown threatened to sue the estate on the note and demanded payment thereof. John C., for himself and as executor of the estate of Daniel, to prevent the suit, agreed to and with Brown to give him additional surety on the note. In pursuance of such agreement, the appellant, with the express agreement and understanding between himself, Brown, and John C., that the estate of Daniel should not be in any manner released, but that it should remain liable as it then was, and that in signing the note he should do it as surety for John C. and the estate of Daniel; in consideration of all of which, the appellant signed the note as additional surety. Afterward an action was instituted on the note and judgment recovered against the appellant and John C. in the Washington Common Pleas Court for five hundred and ninety-four dollars and sixty cents, which the appellant was compelled to pay, and on the 8th day of July, 1871, he paid six hundred and three dollars and fifty-five cents, the amount of principal and interest due on the judgment. John C. is and was at the time of the rendition of the judgment wholly insolvent. John C. has ceased to be the executor of the estate, and the appellee has been appointed and is acting as administrator of the estate with the will annexed.

The complaint was sworn to.

The appellee seeks to maintain the judgment on the ground that there was such a material alteration of the note as released the estate. He refers to *Judah v. Zimmerman*, 13 Ind. 286; same parties, 22 Ind. 388; *Harbert v. Dumont*, 3 Ind. 346; and other authorities showing that any material alteration of the contract without the assent of the surety releases him.

They are not applicable to the case at bar. In this case,

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the name of the appellant was added not only with the assent, but at the request of the personal representative of the original surety, and with the express agreement that the estate should not be released. It is averred in the complaint that the principal in the note was the executor of the estate of the surety; that for himself and as such executor he agreed with the payee of the note to give additional surety, and in pursuance of that agreement and with the express agreement that his signing the note should not release the estate, and that he should sign it as surety for both the principal and the estate of the surety, he signed the note as such additional surety.

We need not decide whether adding the name of the appellant to the note as an additional surety, without the assent of the original surety or his personal representative, was such an alteration as would have released him. But see *Cobb v. Titus*, 10 N. Y. 198; *McCaughey v. Smith*, 27 N. Y. 39; *Brownell v. Winnie*, 29 N. Y. 400; *Bowser v. Rendell*, 31 Ind. 128.

The judgment of the said Washington Common Pleas is reversed, with costs. Cause remanded, with instructions to overrule the demurrer to the complaint, and for further proceedings in accordance with this opinion.

RUDISILL v. EDSALL.*

From the Allen Circuit Court.

R. Brackenridge and W. H. Jones, for appellant.

L. M. Ninde, for appellee.

PETTIT, C. J.—No line is numbered, nor is there one marginal note made on the transcript, as required by rule 19; and for failing to prepare the record as required by that rule, for our consideration, the submission is set aside. No

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abstract is now required, but numbering of the lines and marginal notes is, by the rule referred to, and we cannot examine the record unless this rule is complied with.

*November term, 1872.

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48	377
148	427
48	377
150	510

COUNTY CLERK.—*Allowance for Attendance in Court.*—A circuit court has no legal power to make an allowance to the clerk for his daily attendance in court during the year 1870; and if such allowance has been made, the auditor is not bound to issue a warrant therefor.

From the Allen Circuit Court.

R. Brackenridge and W. H. Jones, for appellant.

L. M. Ninde, for appellee.

DOWNBY, C. J.—Edsall is clerk of the circuit court of Allen county, and Rudisill is the auditor. The circuit court made certain allowances to Edsall, at the rate of three dollars *per diem*, for attending court, while he was acting as such clerk, during the year 1870. Edsall presented certificates of these allowances to Rudisill, and demanded of him a warrant on the treasurer for the amount, which Rudisill refused to issue. Thereupon Edsall commenced this proceeding by mandate to compel him to issue the order. The circuit court sustained the claim of Edsall to the relief demanded, and rendered judgment accordingly, from which Rudisill appealed.

The question, and the only question, presented for our decision is, whether or not there is legal authority for the allowance to the clerk of the circuit court of three dollars per day for the time during which he attends the sittings of the court in the discharge of his official duties. The question seems to have been decided adversely to the appel-

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lee in *Ex parte McKee*, 28 Ind. 100. It is conceded by counsel for appellee that the claims, for which an order was sought on the treasury, are not for extra services under section five of the act of 1865, Acts 1865, p. 70, which authorizes the board of county commissioners to allow the clerk and sheriff for extra services. It is contended, however, that the board of commissioners does not possess the only power to make allowances out of the county treasury, and we are referred to the first six sections of chap. 3, 1 G. & H. 64. The first section prohibits the drawing of money from the treasury of the county except by authority of law, and according to the rules prescribed in the succeeding sections of the act. The second section empowers the auditor to draw his warrant for amounts fixed by law, or by a public record, etc. The third section allows him to draw his warrant for a sum allowed or certified to be due by any court of record authorized to use a seal, and having jurisdiction beyond that of justices of the peace, or by the board of commissioners.

These sections do not provide in what cases allowances may be made by the courts.

Section four authorizes the courts designated in the third section to allow sums to persons serving as assistants to the sheriff, in preparing the court-house for the reception of such courts, and in preservation of order, and in attendance upon juries, and to persons performing any services under the order of the court. But the number of such assistants employed shall never exceed the actual necessity of the case. This section cannot embrace the allowance of a *per diem* to the clerk. He is not such an officer or person as contemplated by the section. He does not attend upon the court or render services in consequence of any order of the court, but he attends by himself or deputy, because the proper discharge of his official duties and the statute require him to be present. 2 G. & H. 13, sec. 3.

Neither the fifth nor sixth section can have any relation to the question under consideration.

Counsel also refer to the latter clause of sec. 29 of the fee law of 1855, 1 G. & H. 338, which provides, that, "whenever there shall appear a claim for official services rendered by any officer of a court of justice, and there does not appear to be any fees fixed by law as a compensation therefor, the court, judge, or justice, on application, shall make an order specifically fixing the allowance for such claim." We had not supposed, and do not now think, that the clause of the section in question has any reference to the allowance of a *per diem* compensation to a public officer. But we suppose that as the legislature had by the act undertaken to fix specifically the fees which officers should be entitled to and receive for their services, and as it was possible that some official act might be required by law for which no fee was fixed in the tariff of fees, the clause was inserted to meet such a case. If the clerk is entitled to a daily compensation for his time, in addition to the fees which he is entitled to for the official acts performed by him, which official acts he performs in open court as well as in his office, it is difficult to see why he should not have such daily allowance for the time when he is in his office as well as when he is in open court. Counsel attempt to make a distinction between services rendered for the county and those rendered for the court, and insist that the services in question were rendered for the court, and not for the county. This distinction is not very obvious. If the services were rendered for the court, and not for the county, it would seem to follow that the court, and not the county, should pay for them. But the appellee in this case is seeking his pay out of the county funds.

But it is said that all the clerk's entries could as well be made out of court as in it from the judge's minutes; that he must keep his office open, as well as be present in court, but that as the law requires him to be in court, he should have an allowance for it. There has probably never been a time in the history of the State when the law did not require the attendance of the clerk, by himself or deputy, upon the courts of which he was clerk. We have not examined all

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the statutes; but see R. S. 1843, p. 653, sec. 46; 2 G. & H. 13, sec. 3. That the legislature in its various revisions of the fee law has never provided specifically for such *per diem* compensation, is very strong evidence that none such was intended. Following the case of *Ex parte McKee, supra*, we must hold that the circuit court had no legal power to make the allowances in question, and that the auditor was not bound to issue his warrant therefor. This case is decided, of course, without any reference to the act of March 8th, 1873, which was not in force when the services were rendered.

The judgment is reversed, with costs, and the cause remanded, for further proceedings in accordance with this opinion.

WORDEN, J., was absent.

HUGO v. McCONNELL ET AL.

From the Posey Common Pleas.

W. P. Edson, E. M. Spencer, and W. Loudon, for appellant.
J. H. Laird, for appellee.

PETTIT, J.—This suit was brought by John McConnell and William A. Soule, against William H. Hugo and John R. Hugo. All parties stayed in the case until the end of it; and final judgment was rendered against both the Hugos, defendants below. But one of them asked, or has taken, an appeal to this court and assigned errors. No action has been taken under section 551, 2 G. & H. 270; and under the uniform ruling of this court, the appeal must be dismissed.

The appeal is dismissed, at the costs of the appellant.

BURDICK v. HUNT ET AL.*

From the Marion Common Pleas.

E. W. Kimball, for appellant.

J. Hanna and *F. Knefler*, for appellees.

PETIT, J.—This appeal must be dismissed under rule one of this court. The caption or heading of the assignment of errors is as follows:

“William P. Burdick v. Julia A. Hunt, Adm’x of David P. Hunt, and v. Judson Hale.”

The names of the parties below are these: “Wm. P. Burdick v. Judson Hale, Mrs. Hale, his wife, Jacob Klingensmith, and Julia A. Hunt.”

The transcript does not show in any way that any of these persons had ceased to be parties to this suit before it was terminated, and consequently they must be parties to the assignment of errors on an appeal to this court.

*May term, 1871.

BURDICK v. HUNT ET AL.

BILL OF EXCEPTIONS.—*Documentary Evidence.*—Parties cannot, by agreement in writing, authorize the clerk, in making up a transcript for the Supreme Court, to annex to the record documents used in evidence, without copying them into the record and having them authenticated as other evidence.

PRACTICE.—*Comparison of Handwriting by Supreme Court.*—Upon a question as to the genuineness of a signature, the Supreme Court can decide nothing by an examination and comparison of signatures.

EVIDENCE.—*Expert.*—*Testimony by Comparison of Signatures.*—Where the genuineness of a signature is in dispute, a witness who is an expert may have papers conceded to be genuine placed in his hands, and he may compare the genuine signatures with the one in dispute, and from such comparison state whether or not the disputed signature is genuine or simulated.

43	381
124	406
43	381
136	474
43	381
142	69
43	381
144	643
147	375
43	381
150	104

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SAME.—Papers not in evidence in the cause, nor admitted to be genuine, cannot be used in making such comparison.

GRAND JUROR.—*May be a Witness.*—The oath of grand jurors does not prevent the public or an individual from proving by one of the jurors, in a court of justice, what passed before the grand jury.

EVIDENCE.—*Witness.—Cross-Examination.—Impeachment.*—A witness testifying on the trial of a cause may, for purposes of impeachment, be asked, on cross-examination, whether he did not at a certain time and place testify before the grand jury, and there make statements different from his present testimony.

From the Marion Common Pleas.

E. H. Lamme and *R. O. Hawkins*, for appellant.

J. Hanna and *F. Knefler*, for appellees.

DOWNEY, C. J.—The appellant sued the appellees, and there was judgment against him. The facts of the case are these: The action was founded upon a promissory note dated December 14th, 1867, maturing June 14th, 1869, for eight hundred and thirty-three dollars and thirty-four cents, executed by one Judson Hale, payable to Jacob Klingensmith, as commissioner appointed by said court to sell certain real estate of one David P. Hunt, deceased, the husband of said Julia A. Hunt. She was the administratrix of his estate, and Klingensmith indorsed the note to her, and has nothing more to do with it. Hale, the maker of the note, secured the payment thereof by mortgage to Julia A. Hunt, as administratrix of her husband's estate, on the same real estate for which the note was given. The appellant, Burdick, obtained the possession of the note from one Burns, claiming to be the agent and attorney of Julia A. Hunt, with an indorsement upon it purporting to be that of Julia A. Hunt, and as holder thereof instituted this action against Hale, the maker, Klingensmith, the payee and first indorser, and the said Julia A. Hunt, praying for judgment against the maker for the amount of the note, and for foreclosure of the mortgage.

Hale answered: 1. A general denial. 2. Denying that there was any consideration for the indorsement of Klingensmith and Julia A. Hunt to the appellant, and that he is the

owner of the note. 3. That before the commencement of this suit Julia A. Hunt, by action of replevin, obtained the possession of the note, and was the holder thereof at the time this suit was instituted, and that the action of replevin was still pending in the Marion Circuit Court.

Julia A. Hunt alleged in an answer and cross complaint, that she was the real and lawful owner of the note and mortgage; that Klingensmith had assigned the note to her, and afterward the maker secured the payment thereof by said mortgage; that what purports to be her indorsement of said note is false and forged; that she never indorsed or assigned said note or authorized any one else to do so; that she is still the real owner of said note, and prayed judgment against said Hale, and for the foreclosure of said mortgage. This answer and cross complaint were verified by the oath of Julia A. Hunt. A demurrer was sustained to the third paragraph of the answer of Hale, and there was a reply by general denial to the second paragraph, and also to the answer and cross complaint of Julia A. Hunt. Klingensmith filed a pleading disclaiming any interest in the note. The case being thus at issue, the material question was, whether or not Julia A. Hunt had indorsed the note or authorized it to be done. A trial by jury resulted in a verdict for the said Julia A. Hunt, and after a motion for a new trial was made and overruled, there was final judgment for her on her answer and cross complaint.

The assignment of error is peculiar in form, but we understand it to amount to a general assignment that the court erred in overruling the motion for a new trial. It can amount to no more than that.

It may be as well remarked here as elsewhere in this opinion, that in addition to the original note, with the indorsements upon it, there are numerous other original documents appended to the case. It is claimed that the name of Julia A. Hunt was indorsed on the note by her daughter, and that her name was signed to or indorsed upon the other documents by the same person. Counsel have agreed in writing, "in order more effectually to present the document-

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ary evidence in the case to the Supreme Court, that the clerk of said common pleas court, in making a complete record of the case for the Supreme Court, may annex the said documentary evidence, consisting of papers marked from A. to M. inclusive, to said complete record, without copying them into said record, but referring to them by their letter as marked." This practice is wholly irregular and inadmissible. There is a bill of exceptions in the record, to which we must look for the facts relating to what occurred at the trial. We can decide nothing upon an examination of the signatures in question. Whether the name on the note was the signature of Julia A. Hunt or not was a question for the jury that tried the case in the common pleas. Whatever evidence was introduced or offered and rejected in that court must regularly have gone into the bill of exceptions, and come before this court by a copy of the bill of exceptions contained in the record. These documents are in no way authenticated or identified as the documents referred to in the agreement of counsel, except as they contain upon them a letter of the alphabet as indicated in the agreement. There is no mention made of them in the certificate to the transcript or in any other certificate. We cannot regard them, for any purpose, as a part of the record. We think, however, that the questions which are presented and relied upon by counsel for the appellant are so presented by the regular bill of exceptions, that they may be considered and passed upon by us. They are with reference to the refusal of the court to allow certain witnesses produced by the plaintiff to express an opinion formed by a comparison of the signature on the back of the note with the signature to certain other papers which were produced, and in refusing to require the daughter of the said Julia A. Hunt to answer as to what she had testified before the grand jury.

William Wallace, having been sworn, testified that he had been clerk and deputy clerk for ten years, a practising lawyer, skilled in and acquainted with handwritings, and used to comparing the same, but not having seen Julia A. Hunt or

her daughter write, nor having had any business correspondence with them, was shown certain papers upon which was the genuine signature of Julia A. Hunt, as written by her daughter, and then asked to compare said genuine signatures with the disputed signature on the back of the note sued on, and from such comparison to state whether or not the disputed signature was genuine or simulated. To this interrogatory the defendants objected, on the ground that it was not competent to prove the genuineness of the disputed signature by mere comparison with a signature admitted or proved to be genuine, the witness having no previous knowledge of the handwriting of the person. This objection was sustained by the court.

William C. Smock, and also certain other witnesses, being the clerk of the court and deputies employed in his office, having been sworn, produced certain papers with the signature of Julia A. Hunt thereto from the files of the office, which had been received and filed in the course of business, and acted upon as genuine, and were each in succession asked to take those papers and compare the signatures thereon with the signature on the back of the note, and state whether or not the latter was made by the same person as the former, and whether the latter and former were genuine. The same objection was made to this question when asked of each of said witnesses as was made to the question asked of Wallace, and the ruling on it was the same.

These rulings were stated as reasons for a new trial.

There is scarcely any question in the law of evidence concerning which there is greater diversity in the opinion of courts than there is with reference to the admissibility of evidence, by comparison of handwritings, in order to prove the genuineness of a disputed signature. To attempt to derive any uniform rule from the decisions of the courts of the states of the Union would be a fruitless labor. Certain rules on the subject of the proof of handwriting may be gath-

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ered from our own decisions and other sources, which may serve the purposes of the present inquiry.

1. When the witness has seen the party write, and has thus become acquainted with his handwriting, he is competent to testify, and this although he has seen him write on but one occasion, and then only his signature. 2 Stark. Ev. 652; 1 Greenl. Ev., sec. 577. The weight of the evidence is for the court or jury.

2. Where the witness has acquired a knowledge of the handwriting of the party by correspondence with him, or from having seen letters, bills, or other documents afterward admitted by the party to the witness to be genuine, or where such letters, bills, or other documents have been acted upon by the witness as his, the party having known and acquiesced in such acts founded upon their supposed genuineness, or by such adoption of them into the ordinary business transactions of life, as induces a reasonable presumption of their being his own writing. 1 Greenl. Ev., sec. 577; *Chance v. The Indianapolis, etc., Gravel Road Co.*, 32 Ind. 472. In the cases which we have thus far stated, the witness testifies from the knowledge of the handwriting of the party which he has, in some of the modes indicated, previously acquired. There is not in these cases in any proper sense a comparison of handwritings. By a comparison is meant an actual production and comparison of two or more instruments or signatures, as a means of ascertaining whether they were written by the same person. It may be true, as stated by Prof. Greenleaf, that all evidence of handwriting, except when the witness saw the document written, is, in its nature, comparison. But this is not the meaning of the word in its strict and proper sense.

With reference to evidence by comparison of handwritings, it was decided by this court, in *Clark v. Wyatt*, 15 Ind. 271, that it was not admissible, even where the comparison was sought to be made between the disputed signature and signatures to other instruments conceded to be genuine. The court said, in general terms, that the settled rule in

England was, that evidence founded on a mere comparison of hands, by witnesses, would not be allowed, and the court in that case adopted and followed this general rule. The court also held in that case, that witnesses could not testify from a mere comparison of the disputed signature with the signature of the party to two affidavits filed by him in the cause. But in *Chance v. The Indianapolis, etc., Gravel Road Co., supra*, the court said that the general rule is not correctly stated in *Clark v. Wyatt, supra*. The court further said: "While it is true, that a witness who is not an expert must speak from his knowledge of having seen the party write, or from authentic papers derived in the course of business, it is equally true, that an expert may give his opinion from mere comparison." The court laid down rules by which such evidence may be admitted in two classes of cases; first, when there are other papers already in evidence in the cause, admitted to be genuine, in which case the jury may make the comparison, either with or without the aid of experts; and, second, where the other writings which are produced are admitted to be genuine, there being no dispute as to their authenticity. Prof. Greenleaf, after reviewing the cases, says: "If it were possible to extract from the conflicting judgments a rule, which would find support from the majority of them, perhaps it would be found not to extend beyond this: that such papers can be offered in evidence to the jury, only when no collateral issue can be raised concerning them; which is only where the papers are either conceded to be genuine, or are such as the other party is estopped to deny; or are papers belonging to the witness, who was himself previously acquainted with the party's handwriting, and who exhibits them in confirmation and explanation of his own testimony." 1 Greenl. Ev., sec. 581.

It appears that the papers placed in the hands of Wallace were papers conceded to be genuine, and he was asked, as an expert, to compare the genuine signatures with the disputed signature on the note sued on, and from such comparison to state whether or not the disputed signature was

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genuine or simulated. This question he was not allowed to answer. According to the rules as laid down in the case of *Chance v. The Indianapolis, etc., Gravel Road Co., supra*, this examination should have been allowed. We think we should follow that case rather than go back to the rule in *Clark v. Wyatt*.

As Smock and the other witnesses were offered as experts, to compare papers not in evidence in the cause, nor admitted to be genuine, with the disputed signature, and express an opinion founded upon such comparison, the rules laid down in the case in 32 Ind. required that their testimony should be excluded, and we conclude that the court committed no error in its exclusion.

The next question in the case is this: The daughter of Julia A. Hunt, who acted as the amanuensis of her mother in signing her name, who, it was contended, had signed her mother's name on the back of the note in question, was examined as a witness in this case, and denied having written the name upon the note. She was asked, on cross-examination, whether she had not been a witness against said Burns, who had been the attorney of her mother before the grand jury, and answered that she had been such witness before the grand jury, in the Marion Criminal Court, at the court-house in Indianapolis, in December, 1868. Thereupon the appellant, by his counsel asked her the following question: "Did you not state at the time and place and before the grand jury then, that you indorsed this note by the direction of your mother, and that she gave it to Burns?" This question was objected to by the defendants, on the ground that it was not a competent cross-examination, and was not competent as laying the foundation to contradict her by any of the grand jury, and because the evidence given before the grand jury was secret and could not be divulged either by the witness or by any member of the grand jury, and that it was not competent to inquire as to what transpired before the grand jury. The court sustained the objection. This ruling was stated as a reason for a new trial.

As to the first ground of objection to this cross-examination, that is, that it was not relevant to the examination in chief, and therefore not a proper cross-examination, we think the objection is not well founded. The witness testified in chief that she did not indorse her mother's name on the note. It was competent to interrogate her as to statements made by her contrary to what she testified to on the trial, and to impeach her by proving such statements if she denied them, unless the fact that such statements were made before the grand jury changes the rule. Counsel for appellees base their objection to this cross-examination, merely on the ground that the statement having been made before the grand jury cannot be inquired into, nor can any grand juror testify to it. It has been more than once decided by this court that the oath of grand jurors to keep their proceedings secret does not prevent the public or an individual from proving by one of the jurors, in a court of justice, what passed before the grand jury. *Burnham v. Hatfield*, 5 Blackf. 21; *Shattuck v. The State*, 11 Ind. 473. But it is urged that, whatever may have been the rule before, since the legislature prescribed the form of oath which shall be administered to grand jurors, they cannot so testify. The part of the oath in question is this: "That you will not disclose any evidence given, or proceeding had before the grand jury." 2 G. & H. 387, form 56. The case in 11 Ind. was decided long after the enactment of this form by the legislature. But aside from this, we think it cannot be supposed that the legislature intended to change the rule which had before existed. As thus understood the grand jurors are required to keep secret the evidence given and proceedings had before them, unless legally called upon in a court of justice to make disclosures. In our opinion the cross-examination was material and competent.

The judgment is reversed, with costs, and the cause remanded, with instructions to grant a new trial.

Hinkle v. Reid.

HINKLE v. REID.

PLEADING.—*Judgment.*—Where a judgment is the foundation of an action, a copy of it need not be filed with the complaint.

PARTNERSHIP.—*Agreement Between Partners.*—Two partners, being indebted, dissolved the partnership, and, by agreement, one received all the assets and was to pay all the debts; and he failing to pay, the other was compelled by legal proceedings to do so.

Held, that the latter could recover from the former the amount so paid.

From the Sullivan Circuit Court.

S. Coulson and *J. M. Hanna*, for appellant.

J. T. Gunn, *N. G. Buff*, *G. H. Voss*, *B. F. Davis*, and *J. A. Holman*, for appellee.

OSBORN, J.—This was an action instituted by the appellee against the appellant. It is alleged in the complaint that the parties to the action, on the 1st day of November, 1865, entered into partnership in the practice of medicine, and in the business of buying and selling drugs at retail; that on the 1st day of August, 1867, the partnership was by mutual consent dissolved; that in consequence of being unable to settle their partnership affairs in a satisfactory manner to both parties, the appellant commenced an action against the appellee to settle the partnership accounts and matters in controversy; that it was alleged in the complaint in that action, among other things, that the appellee had borrowed of John Pinkston two hundred and twenty-four dollars; that the appellant had signed the note for the sum so borrowed as surety; that it was borrowed entirely for, and applied solely to, the use of the appellee; that the appellee since the dissolution had refused to pay the note, alleging that it was a partnership debt; that he had no other means than his interest in the assets of the partnership, and if that was squandered the appellant would be without remedy to secure the amount due him from the partnership assets, then in the hands of the appellee; that he prayed for judgment for two thousand five hundred dollars, and that the appellee

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should be required to pay the partnership debts, or place money or property in the hands of the appellant sufficient to pay those debts or indemnify him against loss in that amount if he should pay the same, and that the appellee should pay or release the appellant from any liability in consequence of having signed the note to Pinkston as surety, and for other relief. It further alleges that at the September term of that court, 1867, such proceedings were had in the action that Samuel Wall was appointed receiver to take into his possession the notes and accounts due the firm, to collect and report to the court, and the cause was continued; that the receiver did take possession of the property of the firm, under the order and appointment of the court; that afterward, at the November special term of the court, 1868, after evidence had been given that Pinkston had loaned the money to the firm, judgment was rendered in the action, wherein, after reciting that the amount due to the appellant from the firm and the appellee, and to others from the firm, and the costs of that action, was about equal to the assets of the firm undisposed of and unappropriated, and for the purpose of settling the action and the affairs of the partnership, the appellant had proposed to take the assets then in the hands of the receiver, Wall, and pay all the debts of the firm and of the appellee to the appellant and hold the appellee harmless therefrom, and that the appellee accepted that proposition, it was, therefore, ordered that the receiver should turn over the remainder of the assets in his hands belonging to the firm, to the appellant. It further alleges that Wall, in pursuance of the judgment, turned over and paid to the appellant in notes and cash the sum of \$1,576.44; that notwithstanding the agreement of the appellant and the judgment thereon, and in violation thereof, he has wholly failed and refused to pay the debt due to Pinkston; that at the March term of the same court, 1870, Pinkston recovered a judgment thereon against the appellant and appellee for \$275.25; that in the action the court adjudged on the question of the suretyship, raised by the appellant in his cross

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complaint against the appellee filed therein, and found that he did not sign it as such surety, and that the debt was a partnership debt, and rendered judgment accordingly; that an execution issued on the judgment to the sheriff who threatened to levy the same on his property; that the appellant refused to pay the judgment, and that the appellee under compulsion paid the sheriff on the execution \$149.68; a copy of the judgment was filed, but not a transcript of all the proceedings in the cause referred to in the complaint.

There was a second paragraph, alleging that the appellant was indebted to him in the sum of two hundred and six dollars for money had and received by him for the use of the appellee, and a refusal to pay. There was a prayer for judgment on both paragraphs.

The appellant filed a demurrer to the whole complaint, and for cause assigned the following: "The first paragraph of plaintiff's said complaint does not state facts sufficient to constitute a cause of action." The demurrer was overruled, and the appellant excepted. The cause was submitted to the court and a finding and judgment rendered against the appellant for \$149.68 and costs.

The errors assigned bring before the court the sufficiency of the complaint, whether the demurrer was good or bad.

The appellant relies upon the rulings in *Reasor v. Raney*, 14 Ind. 441, *Norris v. Amos*, 15 Ind. 365; and others following them. Those cases were overruled in *Lytle v. Lytle*, 37 Ind. 281, and that case has been followed in *Wyant v. Wyant*, 38 Ind. 48, and others. So that, although a judgment is the foundation of an action, a copy of it need not be filed with the complaint.

In the case at bar the allegations in the complaint show that the appellant had instituted an action against the appellee, and on his motion a receiver had been appointed to take possession of the partnership effects of the parties. Afterward he proposed to take all the property from the receiver and pay off all the debts of the firm; that proposition was assented to by the appellee, and judgment was entered

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accordingly. In pursuance of the agreement and judgment, the appellant took from the receiver all of the firm property, consisting of money and notes. He failed to pay all the firm debts, and the appellee has been compelled by judgment and execution to pay a portion of such debts. It is difficult to understand upon what grounds he can resist a demand to refund the amount thus paid. The amount of the partnership property was about equal to the liabilities of the firm. He proposed to take it and pay those liabilities. The appellee accepted his proposition, and with the assent of both, it was sanctioned by the judgment of the court. He afterward recognized it and took the property and has received the full benefit of it.

The complaint was good, and the court committed no error in rendering judgment upon it.

The judgment of the said Sullivan Circuit Court is affirmed, with costs.

HAMILTON v. WINTERROWD ET AL.

INTEREST.—*Extension of Time of Payment.*—Where interest has been paid in advance, under an agreement to extend the time of payment of the principal debt, it is not of any importance in a suit against a surety that the rate of interest paid was greater than the legal rate.

SAME.—*Implied Agreement to Forbear.*—If a creditor receives of his debtor interest on his debt in advance, the law implies from such transaction an agreement of forbearance during the time for which such interest is paid in advance, unless there is an agreement to the contrary. An agreement for forbearance need not be express.

PLEADING.—It is sufficient to state in a pleading facts from which the law implies an agreement, without in terms averring the agreement.

SAME.—In a suit on a note, though an answer by a surety allege that the time of payment of the note was, for a valuable consideration, extended for six months, without the surety's knowledge or consent, and the facts alleged are such that the law will imply an extension of time for a shorter period, the answer will be good on demurrer.

43	306
134	586

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PRACTICE.—Amendment.—Variance.—An amendment which might have been made in the court below, to make a pleading correspond with the proof, will in the Supreme Court be deemed to have been made.

From the Shelby Circuit Court.

A. Major, S. Major, and C. A. Ray, for appellant.

E. H. Davis and C. Wright, for appellees.

WORDEN, J.—This was an action by the appellant against the appellees, Andrew J. Winterrowd, Simeon Carney, and Jackson Maple, upon a promissory note executed by the defendants to the plaintiff, for the sum of sixteen hundred dollars, dated April 25th, 1866, payable ninety days after date. Issue, trial by the court, finding and judgment for the defendants, a new trial having been refused to the plaintiff.

Winterrowd was discharged by proceedings in bankruptcy, and no question is made as to him. Maple and Carney pleaded as follows:

“The defendants, Maple and Carney, for answer to plaintiff's complaint, say that they admit the execution of the note sued on, but say that plaintiff should not recover against them, for they say that they and each of them signed their names to said note as the sureties of their co-defendant Winterrowd, and that the plaintiff knew [and] had notice at the time he received said note. And that afterward, on the 12th day of March, 1867, the plaintiff agreed with the defendant Winterrowd, in consideration that he, Winterrowd, would pay the plaintiff a large sum of money as and for the interest then due upon said note, and the interest in advance for six months next after said date, at the rate of twelve per cent. per annum, that he, the plaintiff, would extend the time of payment of said note for six months from said 12th day of March, 1867; and these defendants say that for that purpose, the defendant Winterrowd did pay the plaintiff one hundred and seventy-six dollars, and plaintiff agreed with defendant Winterrowd to extend the time for the payment of said note for the space of six months from and after the

12th day of March, 1867, without the knowledge or consent of these defendants, or either of them; wherefore," etc.

The plaintiff filed a demurrer to this answer for the want of sufficient facts, but it was overruled and exception taken. The ruling is assigned for error.

It is objected to the answer, as we understand the briefs of counsel for the appellant, that it is bad because the sum alleged to have been paid on the 12th of March, 1867, viz., one hundred and seventy-six dollars, was not sufficient to pay the interest that had then accrued upon the note, at the rate specified, and also to pay the interest in advance for six months at the same rate. This objection is based on the theory that, at the time the alleged payment was made, no interest had been paid on the note. It does not appear by any express allegation whether any, or if any, how much, had then been paid. But we think the pleading means, fairly interpreted, that the one hundred and seventy-six dollars covered the unpaid interest and the interest in advance for six months, both at the rate specified. But there is also another view of the pleading, assuming that no interest had been paid previous to March 12th, 1867. The interest on the note from its maturity to that date, at the rate specified, would be, as we compute it, about one hundred and twenty dollars. This deducted from the amount paid left fifty-six dollars to be applied as interest in advance. This would pay at the rate specified, for the time of three months and a half. The pleading is, therefore, in any aspect in which it may be viewed, good. We do not consider it of any importance that the rate paid was greater than the legal rate of interest. *Dickerson v. The Board of Commissioners of Ripley Co.*, 6 Ind. 128. The payment of interest in advance by a debtor to the creditor, the latter receiving it as such, implies an agreement for forbearance during the time for which such interest is paid, unless there is some agreement or understanding to the contrary. The counsel for the appellant claim that there must have been an express agreement for forbearance. We do not think so. The law implies con-

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tracts in a great variety of cases. Those that are implied are as binding as those which are expressed by the parties. A very large proportion of the contracts that are made the subjects of adjudication are those implied by law. When a debtor pays to his creditor interest in advance on money which he owes him, and the creditor receives it as such, in the absence of any understanding to the contrary, the implication is irresistible that the debtor is to have the use of the money during the time for which interest is paid, and that the creditor shall forbear enforcing collection during the same time. We think the law clearly implies an agreement for forbearance in such case. We are aware that in Massachusetts, some other states, perhaps, following her, a contrary doctrine has been apparently held, but other authorities sustain the view which we take of the law in this respect. *Crosby v. Wyatt*, 10 N. H. 318; *New Hampshire Savings Bank v. Colcord*, 15 N. H. 119. See, also, the case in this court of *Jarvis v. Hyatt*, ante, p. 163.

The answer shows, as we have seen, that interest was paid in advance, for at least three months and a half, from which the law implies an agreement to forbear during that time. It, therefore, states facts sufficient to bar the action as against the sureties, even though the pleading might be deemed bad as setting up an agreement to forbear for six months.

There is, to be sure, no allegation of an agreement to forbear for three months and a half, but the facts are stated from which the presumption of such an agreement arises. The doctrine of implied agreements rests on presumption. " 'Implied contracts,' says BLACKSTONE (vol. 2, p. 443), 'are such as reason and justice dictate, and which, therefore, the law presumes that every man undertakes to perform.' " 1 Pars. Con., 5th ed., p. 4. Presumptions of law, however, need not be stated in pleading. 2 G. & H. 111. It follows that under our code it is sufficient to state facts from which the law implies an agreement, without in terms averring the agreement. *Wills v. Wills*, 34 Ind. 106. This is also the rule in New York. *The Jordan and Skaneateles Plankroad*

Co. v. Morley, 23 N. Y. 552. In this case the court say: "In pleading under the code, it is sufficient to state the facts from which the law infers a liability, or implies a promise." See, also, *Conaughty v. Nichols*, 42 N. Y. 83.

We come to the motion for a new trial. A new trial was asked only on the ground that the finding was not sustained by the evidence and was contrary to law.

The finding was clearly sustained by the evidence. It sufficiently appears that Carney and Maple were the sureties of Winterrowd, of which the plaintiff had notice, and that the extension of time, whatever it may have been, was given without the knowledge or consent of the sureties. Winterrowd was sworn as a witness, and on the subject of the extension of time, testified as follows: "I paid interest after the note matured two or three times, perhaps four times; can't tell just how often I paid. I extended the note by payment of interest. Now I paid it as much as ninety days in advance. May have paid one or more times thirty days in advance. I paid for three months forty-eight dollars. Paid the first in money. May have paid the last in a check running a few days. The first I paid was at maturity for three months, to get three months more time. In three months I paid again forty-eight dollars. Once I paid for one month or five months, but I can't say certainly which. Then I paid for three months again. I paid at the rate of twelve per cent. These payments were made for an extension of time. I did sometimes let it run past the extension, and then paid back interest and three months in advance. The last payment was either in March or May, 1867. This embraced, I think, one or two months' interest due, and three or four months' in advance, making five months' interest paid at one time. I paid interest on several notes at the same time, but each separately, and a memorandum was made on the note of time to which interest was paid. I never paid interest on any note that was not taken up but that I paid also in advance. I never paid interest up to date of payment only. If there was any interest unpaid, I paid that

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and also interest in advance for extension. I can hardly tell how much interest I paid on this note, but I think two hundred and forty to two hundred and fifty dollars. If any difference, I think more than that."

The plaintiff was also sworn as a witness, but his testimony does not very materially differ from that of Winterrowd. He said he thought interest might have been paid in advance on the note.

The variance, if there was any, between the facts proved, and those alleged in the answer, as we have construed it, was amendable. The answer was "proved in its general scope and meaning," and the variance related only to the length of time for which the interest was paid in advance. In such case an amendment could have been made in the court below, to make the pleading correspond with the proof. 2 G. & H. 114, secs. 94, 95, and 96. The amendment will be deemed to have been made. 2 G. & H. 278, sec. 580.

The judgment below is affirmed, with costs.

HAMILTON *v.* WINTERROWD ET AL.

PLEADING.—*Principal and Surety.*—*Extension of Time to Principal.*—In an action on a promissory note, an answer by sureties alleging that at the maturity of the note the creditor, without the knowledge or consent of the sureties, received of the debtor a certain sum of money, being "the interest then due and the interest in advance for six months," and extended the time of payment of said note six months, is good, though the sum alleged to have been paid would not more than cover the amount of interest that appeared to be due at the date of the payment; the answer not showing but that a part of the accrued interest had before that time been paid.

From the Shelby Circuit Court.

A. Major, S. Major, and C. A. Ray; for appellant.

E. H. Davis and C. Wright, for appellees.

WORDEN, J.—This was an action by the appellant against Andrew J. Winterrowd, James Winterrowd, Jackson Maple, and David Conger, upon a promissory note executed by the defendants to the plaintiff, for the sum of four thousand dollars, dated January 9th, 1866, and payable ninety days from date. On issue joined there was a trial by the court, which resulted in a finding and judgment for the defendants, over a motion by plaintiff for a new trial.

The two Winterrowds were discharged by proceedings in bankruptcy, and as to them no question is made.

The defendants Maple and Conger pleaded, among other things, as follows :

“The defendants, Jackson Maple and David Conger, answering for themselves, say that they admit the execution of the note sued on, but say that they signed their names to said note as the surety of their co-defendant, Andrew J. Winterrowd, which fact the plaintiff well knew, and had full knowledge thereof when he took said note, and that no part of the consideration of said note was received by these defendants, as the plaintiff well knew; and defendants say that after the maturity of said note, to wit, on the 20th day of April, 1867, the plaintiff without the knowledge or consent of these defendants, in consideration that said Andrew J. Winterrowd would pay the plaintiff the interest then due upon said note, and the interest in advance for six months from and after the said 20th day of April, 1867, agreed with the said defendant, Andrew J. Winterrowd, to, and did, receive of and from him, the said Andrew J. Winterrowd, the sum of two hundred and forty dollars, the interest then due on said note and the interest in advance for six months from and after that date, and did extend the time of paying off said note for the time aforesaid, without the knowledge and consent of these defendants; wherefore,” etc. Another paragraph was also filed by them, setting up their discharge in a slightly different manner. A joint demurrer for want of sufficient facts was filed to both paragraphs, but

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was overruled, and exception was taken. The overruling of the demurrer is assigned for error.

The objection made to the paragraph set out is, that the two hundred and forty dollars, paid on the 20th of April, 1867, did not pay the interest that was then due on the note, and hence that there was no interest paid in advance; and therefore, that there was no consideration for the agreement to extend the time. At the time the payment is alleged to have been made, the note was a year and a few days past due. The sum alleged to have been paid would only meet the interest on the note for a year. Hence if no interest had been previously paid, the amount paid would not quite cover the interest then due. The objection made is based upon the theory that no interest had been previously paid. Whether there had been or not, does not appear by direct averment. But we think the fair and just meaning of the pleading is, that the two hundred and forty dollars covered whatever interest was then due, and also six months interest in advance. With this construction the answer is unobjectionable. We need not notice the other paragraph. The demurrer was properly overruled, the one being good.

There is no other question in the case but that arising on the motion for a new trial, which was asked on the ground only that the finding was contrary to law and not sustained by the evidence.

We cannot, in accordance with the well established practice, disturb the finding. The evidence tended very strongly to establish the substance of the defence. The case is, in some respects, similar to that of *Hamilton v. Winterrowd*, *ante*, p. 393, in which much that was said is applicable here.

The judgment below is affirmed, with costs.

HAMILTON v. WINTERROWD ET AL.

PLEADING.—Principal and Surety.—Extension of Time.—In a suit on a note, an answer by a surety, alleging that the plaintiff agreed with the principal debtor without the knowledge and consent of said surety, that if the debtor would pay interest in advance at the rate of twelve per cent. per annum, the plaintiff would extend the time of payment for ninety days, and that said debtor did pay said interest at twelve per cent. per annum for ninety days, and plaintiff did give such extension, sufficiently showed that the interest was paid in advance, and was a good answer.

From the Shelby Circuit Court.

A. Major, S. Major, and C. A. Ray, for appellant.

E. H. Davis and C. Wright, for appellees.

WORDEN, J.—Action by the appellant against the appellees on two promissory notes executed by the defendants to the plaintiff, each for the sum of one thousand dollars, and each payable ninety days after date, one dated January 9th, 1866, and the other June 20th, 1866. Issues made up, trial thereof by the court, finding and judgment for the defendants, the plaintiff having unsuccessfully sought a new trial.

The two Winterrowds were discharged in bankruptcy; it will, therefore, be unnecessary to notice them.

David Conger pleaded as follows, after setting up that he was only a surety on the note, of which Hamilton had notice: "That the plaintiff, without the knowledge and consent of this defendant, on or about the 12th day of March, 1867, agreed with the defendant A. J. Winterrowd, and in consideration that said Winterrowd would pay him interest in advance at the rate of twelve per cent. per annum, to extend the time of payment for ninety days, and defendant says that said Winterrowd did pay said interest at twelve per cent. per annum for ninety days, and plaintiff did give such extension on both of said notes; and the defendant further says that at the expiration of said ninety days, plaintiff, upon like agreement with defendant Winterrowd, did further extend said time of payment for twelve months, and that to procure such extension, defendant A. J. Winterrowd

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did agree to pay, and did pay the plaintiff, twelve per cent. interest per annum on both of said notes, and did pay the same, and thereby obtained the extension on said notes without the knowledge and consent of the defendant Conger."

The plaintiff filed a demurrer to this paragraph for want of sufficient facts, but it was overruled, and he excepted.

This ruling is assigned for error. It is objected that the paragraph does not allege that any interest was paid in advance. We think it does. It alleges that the plaintiff agreed, "in consideration that said Winterrowd would pay him interest in advance at the rate of twelve per cent. per annum, to extend the time of payment for ninety days," and "that said Winterrowd did pay said interest," etc. "Said interest" can signify nothing but the interest in advance, which, and none other, had just been mentioned. The answer, we think, was good. See case of *Hamilton v. Winterrowd*, ante, p. 393.

The only other question relates to the sufficiency of the evidence to sustain the finding. The evidence strongly tended to sustain the finding. There was some conflict in the evidence in some respects. Hamilton says, "Conger knew Winterrowd had paid interest in advance, and he acquiesced. He told me it was all right and would be right."

Conger, on the contrary, says, "I did not know that Winterrowd had been paying this interest, and I never acquiesced in it nor in any extension. I never knew anything about it."

The judgment below is affirmed, with costs.



THE JEFFERSONVILLE, MADISON, AND INDIANAPOLIS RAILROAD
COMPANY v. ADAMS.

RAILROAD.—*Animal Killed.*—*Contributory Negligence.*—If the owner of a cow knowingly permits her to run at large in the vicinity of a railroad, where

43	403
195	533
43	402
151	595

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it is not required by law to be fenced, and she strays upon the track and is killed, it not appearing that the killing is wilfully done, the railroad company will not be liable, though the owner may not have known that the railroad was completed.

From the Floyd Circuit Court.

G. V. Howk and *W. W. Tuley*, for appellant.

A. B. Carlton, for appellee.

OSBORN, J.—The appellee recovered a judgment against the appellant for the value of a cow killed by a locomotive of the appellant running upon a railroad in the city of New Albany. The ground of the action was, that the cow was killed by the negligence of the appellant's servants in charge of the train, without the fault of the appellee.

The cause was tried by the court, resulting in a finding for the appellee. Motion for a new trial overruled, exception and judgment on the finding.

The alleged negligence consisted in running a freight train of cars loaded with iron through the city of New Albany on a dark night with a locomotive running backward, at a speed of from three miles to three miles and a half an hour, and while so running of striking and killing the cow. It was necessary to run the locomotive backward in going to or returning from the rolling mill, to which place the train was going with the iron. If the locomotive had been running head first with head-light on, the cow might have been seen in time to stop the train before striking her.

The appellee had voluntarily permitted the cow to run at large unattended, and to go where she pleased; and while she was thus roaming about, she strayed upon the railroad and was killed.

The case of *The Indianapolis, Cincinnati, and Lafayette Railroad Company v. Harter*, 38 Ind. 557, is directly in point, and is decisive of this. In that case, the owner of the cow knowingly permitted her to run at large in the vicinity of a railroad where it was not required by law to be fenced; and it was held that he could not recover. The court, on page 560, says: "Being thus himself guilty of negligence in

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permitting his cow to occupy the place of danger, he cannot complain of the negligence of the defendant. His own want of care contributed directly to the injury." It is true, in this case the appellee testifies that she did not know that the road was finished. She also testified that she knew that work had been done upon it. But whether she knew of the completion of the road or not, she had no right to turn her cow upon the public streets in the city. She did it at her peril. The cow was unlawfully upon the railroad, and in consequence of being so unlawfully there was killed.

It is not alleged or proved that the cow was killed wilfully. The only complaint is, that it was done by the negligence of the servants of the appellant in charge of the locomotive and train.

In *The Jeffersonville, Madison, and Indianapolis Railroad Company v. Underhill*, 40 Ind. 229, it was held that to charge a railroad company with liability for negligence in killing an animal on the line of its road, the complaint must allege that the animal was killed without any negligence of the plaintiff. If it was necessary to allege, it was necessary to prove it. At any rate, it must not appear affirmatively that the negligence of the plaintiff contributed to the injury as in the case at bar.

This case was tried before either of the cases referred to had been decided.

The judgment of the said Floyd Circuit Court is reversed, with costs. The cause is remanded, with instructions to grant a new trial, and for further proceedings in accordance with this opinion.

The Toledo, Wabash, and Western R. W. Co. v. Owen.

THE TOLEDO, WABASH, AND WESTERN RAILWAY COMPANY v.
OWEN.

43	405
126	366
43	405
140	660
142	314
43	405
168	364

SUMMONS.—*Service.—Railroad.*—In an action against a railroad company to recover the value of stock killed, a return of the summons, "Served by reading to" A., "who is the local freight agent of said defendant, at the city of" ect., does not show good service under section 30 of the code.

SAME.—*Statute Construed.*—Section 30 of the code contemplates cases where a corporation, company, or an individual has an office or agency in the county for the transaction of business, and the suit grows out of, or is connected with, the business of such office or agency.

SAME.—Section 36 of the code designates three classes of officers or agents of corporations, upon whom process may be served; first, chief officers; second, officers of secondary rank; third, any persons authorized to trans-act business in the name of the corporation.

SAME.—If no officer of the first or second class can be found, the service may be upon an agent or person of the third class. If the service is upon an officer or person of the second or third class, it must appear by the return that the officer or officers of the higher grades were not found in the county.

SAME.—Under the act of March 4th, 1853 (note to 2 G. & H. 62), as amended (Acts Special Session, 1861, p. 78), the persons who may be served with process against a corporation whose principal office is not in this State are all of one grade, and service on any one of them is good without reference to whether others are found or not.

SAME.—*General Agent.*—A local freight agent is a general agent of a rail-road corporation within the meaning of the above act, and service on such agent is good, though there be a superintendent of the road and a director of the company residing in the county, and conductors daily passing on the trains.

RAILROAD.—*Killing Stock.—Fence.*—That a place on a railroad where an animal is killed is within a city, is not sufficient to excuse the company from fencing the road.

SAME.—*Evidence.*—The plaintiff in a suit against a railroad company for kill-ing an animal may show that after the killing the company repaired and built a fence at the point where the injury occurred, for the purpose of showing that the company regarded the place as one that might legally be fenced.

From the Tippecanoe Common Pleas.

W. Z. Stuart, for appellant.

W. C. Wilson, for appellee.

DOWNEY, C. J.—This action was brought by the appellee against the appellant, to recover the value of a cow injured

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so that she was of no value, by the locomotive and cars on the road of the defendant, at a place where, as is alleged, it could have been, but was not fenced. There was judgment in the common pleas for the plaintiff. There are three valid assignments of error.

1. Overruling the defendant's motion to set aside the service of the process.

2. Rejecting the second paragraph of the defendant's answer.

3. Overruling the defendant's motion for a new trial.

This action was commenced in the common pleas. The third section of the act authorizing such actions, 3 Ind Stat. 415, authorizes the service of the summons by copy on any conductor on any train on the road passing into or through the county. The return to the summons in this case does not show such a service, but after it was amended is as follows: "Served by reading to Mr. Vandusen, who is the local freight agent of said defendant, at the city of Lafayette, Indiana, February 10th, 1870." Signed by the sheriff. It is clear that the service is not good under section 30 of the civil code. 2 G. & H. 57. That contemplates cases where a corporation, company, or an individual has an office or agency in the county for the transaction of business, and the suit grows out of or is connected with the business of such office or agency. Then the service may be upon any agent or clerk employed in the office or agency. Section 36 of the civil code is as follows: "The process against a corporation may be served on the president, presiding officer, mayor, chairman of the board of trustees, or if its chief officer is not found in the county, then upon its cashier, treasurer, secretary, clerk, general or special agent, or, if it is a municipal corporation, upon its marshal, or, if it is an incorporated library company, upon its librarian; if none of the officers aforesaid can be found, then upon any person authorized to transact business in the name of such corporation."

This section appears to make three classes of officers or

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agents of corporations upon whom process may be served. The first is the president, presiding officer, mayor, or chairman of the board of trustees. These are denominated chief officers. The second class consists of cashiers, treasurers, secretaries, clerks, general or special agents, or, in case of a municipal corporation, its marshal, or if it be a library company, its librarian. These are officers of secondary rank. The third class of persons are any persons authorized to transact business in the name of the corporation. If no chief officer, that is to say, an officer of the first class, can be found in the county, then the process may be served upon an officer of the second grade or class. If no officer of the first or second grade or class can be found, then the service may be upon an agent or person of the third grade. When the service under this section is upon an officer or person of the second or third grade, it should appear that the officer or officers of the higher grade or grades were not found in the county. Unless this shall appear by the return or in some other proper manner, the service will be insufficient.

The act of March 4th, 1853, found in the notes to 2 G. & H. 62, as amended in Acts 1861, Special Session, p. 78, is as follows: "That all writs, warrants, or other process issued, or to be issued, from any court of competent jurisdiction in this State, against the president of any railroad company whose principal office is not within this State, may be served on any officer, director, conductor, attorney, or general agent of said company, and said service shall be as binding and of the same effect as if the same had been served upon the president of the company: Provided, however, that process shall not be served upon any officer, director, conductor, attorney, or general agent who may be plaintiff in the suit, or who may have any interest therein against such company. Provided, further, that at least fifteen days notice shall be given of the time and place of the pendency of said suit." The persons on whom process may be served under this section are all of one grade, and service on any one of them is good without reference to whether others

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are found or not. It was under this section, we presume, that the service in this case was intended to be made. The objection to the service is, that at the date thereof there resided in the county of Tippecanoe, D. A. Coleman, superintendent of said railroad for Ohio and Indiana, and James Speers, a director of the company, and that daily eight or more conductors passed through the county, on any of whom service could have been made. It was not denied that the principal office of the company was out of the State, and, hence, a service under this section was proper, if otherwise in accordance therewith. We think the matter resolves itself into the question, whether the local freight agent of the company, that is, the freight agent of Lafayette, was or was not a general agent of the company, within the meaning of the section of the act last quoted. If he was a general agent, then it was proper to serve the process on him, notwithstanding there was a superintendent of the road and a director of the company residing in the county, and several conductors daily passing through the county on their trains. A general agent is one authorized to transact all his principal's business, or all his principal's business of some particular kind. A special agent is one who is authorized to do one or more special things, and is usually confined to one or more particular transactions, such as the sale of a tract of land, to settle and adjust a certain account, or the like. That the authority of an agent is limited to a particular kind of business does not make him a special agent. Few, if any, agents of a railroad company do, or can attend to every kind of business of the company, but to each one is assigned duties of a particular kind, or relating to a particular branch or department of the business. We suppose from the name or designation of the agent in the return in this case, and from our knowledge of the manner of transacting such business, that the local freight agent is an agent whose duties are confined to a particular place, and who, at that place, has a general authority to receive freight to be carried by the company, to have the oversight of the same,

and to see that it is placed in the freight cars of the company for transportation, and that it is his duty also to take charge of freight which may arrive at his depot or station, and preserve the same, and to attend to its delivery to the consignee or his agent. He thus has power to transact all the business of the company of this particular kind, and to do acts binding upon the company, at the depot or station to which he is assigned. This, in our opinion, makes him the general agent of the company within the meaning of the section in question, and consequently authorizes the service of process upon him, the principal office of the company being out of the State. As to the authority of a freight agent to bind the company by his acts in the receipt of freight and also by agreements as to the forwarding of the same, see *Deming v. Grand Trunk Railroad Co.*, 48 N. H. 455, *Burnside v. Grand Trunk R. W. Co.*, 47 N. H. 554; *Wilson v. The York, Newcastle and Berwick Railway Co.*, 18 Eng. L. & Eq. 557.

The second paragraph of the answer attempts to set up facts and circumstances to show that the appellant was not bound to fence or could not legally fence the railroad at the point where the injury to the animal occurred, which is alleged to have been at a point "inside the city of Lafayette as well as within the limits of the defendant's depot grounds, switches, side tracks and work yard as occupied, used, and operated by defendant as such and continued as such from her depot building eastward for a great distance, to wit, to the corporation limits of the city," etc. It is also stated, that in consequence of these facts, the company was not bound to fence the road and could not lawfully do so. It is difficult to see from these statements where the animal was injured. But conceding that the paragraph shows that the injury occurred at a point where the company could not fence, we still think there was no error in striking it out. The general denial was pleaded, and under the issue formed by it the defendant gave evidence as to whether the road could or could not be fenced. We do not find that it has been the

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practice to plead specially the facts going to show that the road could not be fenced.

Just where the animal was injured, we can not tell from the evidence. The place was somewhere between Union street and Greenbush street in the limits of the city of Lafayette, but just at what point on the road between the two streets is not shown. That the place was within the city is not sufficient to excuse the company from fencing. This was so decided in *The Jeffersonville, etc., Railroad Co. v. Parkhurst*, 34 Ind. 501, and *The Toledo, Wabash, and Western Railway Co. v. Howell*, 38 Ind. 447. The map appended to the bill of exceptions and certified to be part of it, and the testimony in the case, show large blocks of ground of ten and twenty acres or more, on each side of the road, which were used for farming, within the points to which we have referred. The cases to which we have just alluded hold that under such circumstances the railroad company is liable for stock killed where the road is not fenced.

It appeared from the evidence that there was a fence along the road at the point in question, but the parts of the fence joining up to the cattle-guards at Salem street and at Greenbush street had been taken away, as it seemed, by the employees of the company, and that the cow got on the road at one or the other of the openings in the fence thus made and went along the road to the place where she was injured. On the trial of the cause, the plaintiff was allowed, over the objection of the defendant, to prove that the company was then repairing, or had lately repaired or replaced these parts of the fence. This ruling of the court was assigned as a reason for a new trial, and is urged here as an error. We think the evidence was properly admitted, to show that the company regarded the place as one where it might legally erect a fence. We do not find any error in the record.

The judgment is affirmed, with five per cent. damages and costs.

Burnside v. Ennis.

BURNSIDE v. ENNIS.

43	411
141	875
43	411
146	228

COURT.—Power over Record.—Courts have full and complete control of the record of their proceedings during the entire term at which such proceedings have been had; and during such term the court may for good cause correct, modify, or vacate any of its judgments; and where the record does not disclose upon what ground the court acted in correcting, modifying, or vacating a judgment, the Supreme Court will presume that it was done for a good and valid reason.

SAME.—Jurisdiction.—When parties are once rightfully in court, the court has jurisdiction over them, and that jurisdiction continues, without further notice, as long as any steps can be rightfully taken in the cause.

PRACTICE.—While a motion for a new trial is pending, it is error to call the cause for trial and dismiss it for want of prosecution.

From the Morgan Circuit Court.

S. P. Oyler and *D. Howe*, for appellant.

S. Claypool and *F. P. A. Phelps*, for appellee.

WORDEN, J.—This was an action by the appellant against the appellee, upon a promissory note executed by the defendant to the plaintiff. Issues were made up, and the cause was submitted to the court for trial, resulting in a finding for the plaintiff. The defendant moved for a new trial. On the 8th day of the August term, 1871, of the court, the motion for a new trial was overruled, and exception, and judgment was entered on the finding, sixty days being given to file a bill of exceptions. The defendant prayed an appeal to the Supreme Court, which was granted.

On the 16th day of the same term, the following entry was made in the cause:

“Comes the defendant by his attorney, and on motion it is ordered that the order overruling the motion for new trial and the judgment heretofore taken at the present term of this court be set aside and held for naught. And this cause is continued on motion for a new trial.”

At the August term, 1872, of the court, the plaintiff, on affidavit filed, moved the court “to expunge from the records of the court all the entries in this cause, * * * subsequent to the judgment herein, heretofore rendered.” The

Burnside v. Ennis.

affidavit, as we understand it, shows that the entry of the judgment on the order book had been duly signed by the judge of the court at the time it was ordered to be set aside; that on the next day after the judgment was rendered, the attorneys of the plaintiff went to their homes in Johnson county and did not return to the court at that term, nor did they learn the action in setting aside the orders that had been made until after the close of the term, nor was the plaintiff present, nor had he any knowledge thereof until after the close of the term.

This motion of the plaintiff was overruled, and he excepted. Thereupon the cause was called for trial, and the plaintiff, in the language of the record, "electing to abide by the former finding and judgment," the cause was dismissed by the court for the want of prosecution, and the plaintiff excepted.

The errors assigned are as follows:

"1st. That said court erred in overruling appellant's motion to expunge from the records the entries subsequent to the judgment in favor of appellant.

"2d. The said court erred in calling the cause for trial a second time, pending a motion undisposed of by the appellee for a new trial," etc.

"3d. That the said court erred in dismissing the cause and rendering judgment against appellant for costs."

In respect to the first error assigned, it is claimed by the counsel for the appellant that after the rendition of the judgment and the signing of the record by the judge, the proceedings in the cause were entirely completed and ended, and that the court had no power or authority to set aside the judgment and the order overruling the motion for a new trial; and that if this could be done at all, it could only be done after due notice to the appellant. The appellant's counsel have filed an excellent, printed brief in support of their views, but we are not favored with any brief for the appellee. We are left, therefore, without the citation of any authorities in support of the action of the court below.

But we think it may be regarded as the established doctrine of the common law, that courts have full and complete control of the record of their proceedings, during the entire term at which such proceedings were had; and that during such term, the court may, for good cause, correct, modify, or vacate any of its judgments. "All mistakes," says Bacon, "were amendable the same term, because it is a roll of that term, and so in the breast of the court during the whole term, and then a new roll might be brought in the cause, and consequently the same roll may be amended." *Blackmore's Case*, 8 Co. 310. The records may be amended during the term, for till its expiration they are considered *in fieri*, and consequently subject to the control of the court. 1 Bac. Ab., Title, Amendment and Jeofail (A); Amendment at Common Law.

So, also, says Tidd: "And, during the same term in which the judgment is given, it is amendable at common law, in form or in substance; but after that term, it is amendable no further than is allowed by the statutes of amendments." Tidd Pr., 4 Am. ed., p. 942.

We cite also a late elementary book, Freeman Judgments, 62, sec. 90. The author says: "One rule is, however, undoubted. It is, that the power of a court over its judgments, during the entire term at which they are rendered, is unlimited. * * * Until that time" (the expiration of the term), "the judgment may be modified, or stricken out." In the case of *Doss v. Tyack*, 14 How. U. S. 297, the court below had entered a decree dismissing a bill, but subsequently, at the same term, on cause shown, it vacated and set aside the decree. In respect to this point, the court say: "The court, in vacating the decree, were correcting an error both of fact and of law, and, during the term at which it was rendered, they had full power to amend, correct, or vacate it, for either of these reasons." See also the case of *Rutherford v. Pope*, 15 Maryland, 579.

There are many other authorities to the same effect, and there may, doubtless, be some to the contrary, but the

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weight of authority clearly establishes the law as above stated. We are not aware of anything in our code that changes the common law rule in this respect. We conclude, therefore, that the court below had the power to set aside the judgment and the order overruling the motion for a new trial.

We are also satisfied that no notice to the appellant was necessary. When the parties were once rightfully in court, the court had jurisdiction over them; and that jurisdiction continued as long as any steps could be rightfully taken in the cause. The jurisdiction continued until there was such a final disposition of the cause as required some new action or proceeding to avoid the disposition made. We quote again from Freeman Judgments, 74, sec. 103: "At the close of the term the parties are dismissed *sine die*, and can no longer be regarded as being in court. Proceedings taken after that time to set aside a judgment must therefore be upon notice to all the parties affected, and the order of a court acting in the absence of such notice will be reversed upon appeal." A case of frequent occurrence may be put, to illustrate the propriety of the law in respect to the power of the courts over their records during the term, even after the record of the entry of judgment has been signed by the judge, and the jurisdiction of the courts over the parties until the close of the term. Suppose that on the call of the docket on the second day of the term, a judgment is taken by default, which is duly entered up by the clerk during the day, and the next morning the minutes are read and signed by the judge. But after the minutes are thus read and signed, the defendant appears, and on good cause shown, moves to set aside the default. It can not for a moment be doubted that in such case the court has power to set aside the judgment, and that, too, without re-acquiring jurisdiction over the plaintiff by giving him notice.

The case supposed is, in principle, precisely the case under consideration.

We are not informed by the record, upon what ground the judgment and order overruling the motion for a new trial were set aside. We must presume, therefore, that it was done for a good and valid reason. We can very well conceive that the judge, on further reflection upon the evidence, or upon the further examination of some legal question involved in the cause, was apprehensive that he might have fallen into an error, which could be corrected by setting aside the judgment and order overruling the motion for a new trial, thus leaving the case to stand upon the motion for further action thereon.

The first error is not well assigned.

The second and third may be considered together. It was clearly erroneous to call the cause for trial, and to dismiss it for want of prosecution, until the motion for a new trial had been disposed of. The cause stood, as we have seen, upon the pending motion for a new trial, and there could be nothing for the plaintiff to do until that motion was disposed of. It was the duty of the court to have passed upon that motion. If overruled, the plaintiff would be entitled to take judgment on the finding; if granted, he could be called upon at the proper time to proceed with the re-trial.

The judgment is reversed, with costs, and the cause remanded, with instructions to proceed in accordance with this opinion.

PUGH, TREASURER, v. IRISH.

43	415
159	891

43	415
169	383

PLEADING.—*Injunction.*—*Illegal Tax.*—In an action against a county treasurer, to enjoin the collection of a tax alleged to have been illegally assessed by the assessor, the complaint must show that the assessment was placed upon the

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tax duplicate, that the duplicate is in the hands of the treasurer, and that he is threatening to collect the tax.

From the Madison Circuit Court.

W. R. Pierse and *H. D. Thompson*, for appellant.

H. Craven, for appellee.

OSBORN, J.—The appellee filed her complaint against the appellant “as Treasurer of Madison county and State of Indiana,” in which she alleges that she is the widow of Samuel D. Irish; that she was his third wife, and that their marriage was without issue; that Irish died in April, 1864, leaving her as his widow and numerous children by his first wives; that he died siezed of real estate in Madison county, which was sold by order of court, and that one-third of the amount of the sale, seventeen thousand two hundred and thirty-eight dollars and thirty-three and one-third cents, is held by certain persons (who are named) in trust for her, on which she draws the semi-annual interest, at the rate of six per cent. per annum; the principal sum not being payable to her during her life, nor to her heirs at her death; that she was assessed by the regular assessor for Fall Creek township in Madison county with the entire amount of the seventeen thousand two hundred and thirty-eight dollars and thirty-three and one-third cents as so much cash on hand, or property of that cash value for the year 1869; that she was born in 1815; that the annuity was not of the value of seventeen thousand two hundred and thirty-eight dollars and thirty-three and one-third cents, nor was it at that time of any greater value than the annual interest thereon; that she annually gives in to the assessor the amount of cash that she has on hand on the first day of January of each year, also the amount she has at interest, “whereby the entire proceeds of her life interest in the estate of her deceased husband is annually taxed against her, and that she was so assessed and taxed by the assessor for the year 1869, with the additional sum of seventeen thousand two hundred and thirty-eight dollars and thirty-three and one-third cents, and

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that the latter item of the assessment was erroneous and illegal.

Prayer that the treasurer and his successors in office be perpetually enjoined from the collection of the tax so assessed on the seventeen thousand two hundred and thirty-eight dollars and thirty-three and one-third cents, and for general relief.

A demurrer was filed to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, which was overruled, and an exception was taken. An answer was then filed in denial of the allegations in the complaint. The cause was tried by the court, resulting in a finding for the appellee. A motion for a new trial was filed and overruled. Motions in arrest of judgment and for judgment against the plaintiff were made in their order and overruled. Exceptions were taken to the rulings. Final judgment was rendered in favor of the appellee according to the special prayer in her complaint.

The demurrer to the complaint should have been sustained. There is no cause of action stated against the appellant. It is not alleged that the amount of the assessment was placed upon the duplicate, or that the duplicate was in the hands of the appellant, or that he was threatening to collect the tax. She avers that she made a report to the assessor, showing the amount of her taxable property, and that the assessor added the amount complained of. She fails to aver that the auditor placed it upon the duplicate, or that the appellant is attempting to collect it. He cannot be held liable for the wrongful acts of the assessor.

The complaint being fatally defective for the cause stated, it is unnecessary and perhaps improper for us to consider any other question.

The judgment of the said Madison Circuit Court is reversed, with costs. The cause is remanded, with instructions to said court to sustain the demurrer to the complaint, and for further proceedings in accordance with this opinion.

THE HOME INSURANCE COMPANY OF NEW YORK v. DUKE.

43	418
154	152

43	418
150	505

43	418
163	647

INSURANCE.—Pleading.—Condition Precedent.—Where the terms of an insurance policy provide, that before a loss shall be payable, the insured shall produce to the company sworn statements of the loss and other matters, together with a certificate of a disinterested magistrate respecting the loss; in an action upon the policy, the complaint must show that these conditions precedent have been performed. And in pleading such performance, it is not sufficient to allege, that, “though proof of said loss has been duly made and notice given, yet said defendant has not made good the loss.”

PLEADING.—Conditions Precedent.—Rule at Common Law.—At common law, in pleading a condition precedent, if there be anything specific or particular in the thing to be performed, though consisting of a number of acts, performance of each must be particularly stated.

SAME.—Rule Under the Code.—The code (2 G. & H. 108, sec. 84) provides, that in pleading the performance of a condition precedent in a contract, it is sufficient to allege generally that the party has performed all the conditions on his part.

SAME.—In pleading performance of a condition precedent, if a party does not make the general allegation authorized by the code, but undertakes to make a specific allegation of performance, he must make it with the particularity and strictness required by the rules of the common law.

INSURANCE.—Certificate of Magistrate.—Where an insurance policy provides that before a loss shall be payable, the certificate of the nearest disinterested magistrate shall be filed with the company, no recovery can be had on such policy until such certificate is produced.

From the Henry Circuit Court.

J. T. Elliott and *J. B. Martindale*, for appellant.

M. L. Bundy, *J. Brown*, and *R. L. Polk*, for appellee.

BUSKIRK, J.—This was a suit by Duke, the appellee, against the Home Insurance Company of New York, the appellant here, on a policy of insurance.

Issues were made and the cause tried by jury. The trial resulted in a verdict and judgment for the appellee.

The appellant demurred to the complaint, because it did not state facts sufficient to constitute a cause of action; the demurrer was overruled, and the ruling excepted to by appellant. This ruling is assigned for error here.

The policy of insurance is made a part of the complaint and is copied into the record.

The ninth clause of the policy provides, that "persons sustaining loss or damage by fire shall forthwith give notice of said loss to the company, and as soon as possible render a particular account of such loss, signed and sworn to by them, stating whether or what other insurance has been made on the same property, giving copies of the written portion of all policies thereon, also the actual cash value of the property, and their interest therein, for what purpose and by whom the building insured, or containing the property insured and the several parts thereof, were used at the time of the loss, when and how the fire originated; and shall also produce a certificate under the hand and seal of a magistrate or notary public nearest to the place of the fire, not concerned in the loss, as creditor or otherwise, nor related to the assured, stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the property insured to the amount which said magistrate or notary shall certify;" and the same clause further provides, "and until such proof, declaration, and certificates are produced, * * * the loss shall not be payable."

By these provisions of the policy, the sworn statement of the loss and other facts required, by the assured, and the certificate of the nearest disinterested magistrate to the facts required to be certified by him, are required to be produced to the company by the assured, as conditions precedent to his right to sue or recover from the company. The loss, by the express terms of the contract, is not payable, until said provisions are complied with by the assured. They are, therefore, conditions precedent, and being such, the complaint must show that they have been performed; otherwise, it does not present sufficient facts to constitute a cause of action. The policy by express terms is made part of the complaint, and being such, the complaint itself shows that these provisions constitute a part of the contract, and being conditions precedent, a performance of them must be shown to make the complaint good.

The Home Insurance Co. of New York *v.* Duke.

It is insisted by counsel for appellee that the complaint contains a sufficient allegation of the performance of these conditions.

On the other hand, counsel for appellant argue as follows: "We insist that the complaint does not show a performance of these conditions precedent. The only averment having any reference to the subject is this: 'And though proof of said loss has been duly made and notice given, yet the said defendant has not made the plaintiff good in said loss,' etc.

"Under the code, 2 G. & H. 108, sec. 84, it would have been sufficient to have alleged generally that the plaintiff had performed 'all the conditions on his part;' such an allegation is equivalent to a reference to each condition precedent, coupled with the averment that he had performed it, and is made to imply that he has done all the acts necessary to its performance. But here the allegation falls very far short of a general allegation that the plaintiff had performed 'all the conditions on his part.' Indeed, the pleader seems to have studiously refrained from averring specifically a performance of those conditions, or alleging in general terms that he had performed 'all the conditions on his part;' 'And though proof of said loss has been duly made and notice given.' What proof had been made, in what form, and by whom? The averment that the proof had been 'duly made' is the statement of a conclusion of law and amounts to nothing. The law requires that pleadings should state facts, leaving the court to draw conclusions of law therefrom; but here the pleader usurps the power of the court and tells us that proof was duly made.

"He does not show that the particular proof required by the policy was made in the manner required, nor does he aver in general terms that he performed that condition precedent, which under the statute is made equivalent to an averment that he did all the acts required by the condition and in the mode therein specified.

"The statute is certainly sufficiently liberal to a plaintiff in allowing him to allege performance of all conditions pre-

cedent on his part in general terms, and we insist that if he would avail himself of its liberality he should be held to a strict compliance. Here, however, the allegation, that 'though proof of said loss has been duly made and notice given,' cannot, by the most liberal stretch of the imagination, be even tortured into an averment (or its equivalent), that the plaintiff had performed all the conditions on his part."

We think the views expressed by the learned counsel for appellant are correct. The allegations in the complaint of performance of the condition precedent are not sufficient, either under the rules of the common law or under the code. The rule as it existed at common law is stated by Chitty thus: "If there be anything specific or particular in the thing to be performed, though consisting of a number of acts, performance of each must be particularly stated." Chit. Pl. 985, note *k*.

The code has modified the strictness of the rule as it existed at common law, by providing that in pleading the performance of a condition precedent in a contract, it is sufficient to allege generally that the party had performed all the conditions on his part to be performed. But this provision has not been extended beyond an allegation of performance, for it has been held that, where the party intends to rely on an excuse for not performing, such as a waiver or negligence of the other contracting party, or a refusal on his part to perform, the particular circumstances constituting such excuse should be averred. The provision of our code confers a new right, but does not destroy the rules of pleading as they existed at the common law. A party may avail himself of the privilege conferred by the code, and may allege generally that he has performed all the conditions on his part. In pleading a performance, the language of the statute should be substantially followed. If a party does not make the general allegation authorized by the statute, but undertakes to make a specific allegation of performance, he

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must make it with the particularity and strictness required by the rules of the common law.

The proof as required by the ninth clause of the policy consists not only of the sworn statement which is to be made by the assured, but of the certificate of the nearest magistrate. We are unable to determine whether the allegations of the complaint relate to one or both of these modes of proof. The language of the policy is, "and until such proofs, declarations, and certificates are produced, the loss shall not be payable."

It is well settled by authority that no recovery can be had, in such a case, until the certificate of the nearest disinterested magistrate is filed with the company. *The Protection Insurance Co. v. Pherson*, 5 Ind. 417; *The Peoria Marine and Fire Insurance Co. v. Walser*, 22 Ind. 73; *The Columbian Insurance Co. v. Lawrence*, 2 Pet. 25.

It does not appear that the attention of counsel or of the court below was called to the eighth section of an act to amend an act entitled "an act for the incorporation of insurance companies," etc., approved March 2d, 1855, which, if applicable, will materially affect the ninth clause of the policy under examination; but such section does not destroy all conditions precedent, and will not, therefore, affect the question of pleading hereinbefore considered.

We are of opinion that the allegations of the complaint, in reference to the performance of the conditions precedent are insufficient, and that the court erred in overruling the demurrer thereto.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to sustain the demurrer to the complaint, to permit the parties to amend their pleadings if they should so desire, and for further proceedings in accordance with this opinion.

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166 281

THE PITTSBURGH, CINCINNATI, AND ST. LOUIS RAILWAY CO.
v. NASH ET AL.

COMMON CARRIER.—*Place of Delivery.*—*Custom.*—Where it is alleged in the complaint against a railroad company on a contract of shipment, and proved on the trial, that it has been the custom of the railroad company to deliver cars loaded with lumber for the plaintiff, at or near the plaintiff's place of business, it is to be presumed that the contract of shipment was made with reference to such custom or usage, and that the railroad company was bound to deliver the cars at the usual place.

SAME.—The liability of a common carrier in the shipment of lumber, coal, or the like, will terminate, in the absence of a contract providing otherwise, when the car containing the same is placed where such articles are usually unloaded, or when the car is delivered at some safe and convenient place designated by the consignee, and notice of such delivery has been given.

SAME.—*Liability for Lumber Destroyed by Fire.*—Where the local agent of a railroad company carrying lumber recognizes the obligation of the company to run the cars to the usual place of delivery, and agrees so to do, but, before the agreement has been carried out, the lumber is destroyed by fire, the company is liable.

From the Lake Common Pleas.

T. C. Annabal, T. A. Hendricks, O. B. Hord, and A. W. Hendricks, for appellant.

M. Wood and T. J. Wood, for appellees.

BUSKIRK, J.—The assignments of error call in question the correctness of the ruling of the court below in overruling the demurrer to the complaint and appellant's motion for a new trial. The material averments of the complaint were substantially proved on the trial. The questions presented for our decision are the same. Instead, therefore, of considering the assignments of error separately, we will condense the averments of the complaint and the facts proved.

The appellant had a depot and side tracks at Crown Point for the reception and discharge of passengers and freight. The plaintiffs were partners engaged in the lumber business on one of the side tracks and near to the said depot in said town; that one Jacob Schell was also engaged in the lumber trade in the said town and at the depot aforesaid, and had

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his lumber yard near the western terminus of said side track and adjoining the same; that the plaintiffs do business twenty rods east of said Schell's lumber yard and a little north of the same; that the plaintiffs receive all lumber either at the lumber yard of Schell from the cars of the defendant, or at a place on one of the side tracks, about twenty rods east of said Schell's lumber yard, between the two grain warehouses of Z. F. Summers, which place is directly south of the plaintiffs' place of business; that about the 1st of June, 1871, the said Schell went to the city of Chicago to purchase lumber for himself; that the plaintiffs furnished him with money and directed him to purchase for them lumber of a certain quality; that the said Schell purchased said lumber in said city and had the same shipped in his name and with his lumber, to the town of Crown Point, which said lumber was carried on the cars of the defendant, and the cars containing said lumber were run off the main line of the defendant's railroad on the east side track, on the north of said main line of the said railroad, and the agents and employees of the defendant ran up the cars loaded with said lumber of the said Schell and the said plaintiffs to a point on said side track, forty rods east of the lumber yard of the said Schell, and more than twenty rods east of the place where the plaintiffs sometimes received lumber shipped on defendant's road, and near the warehouses aforesaid; that the said lumber arrived at Crown Point and was placed on the side track on Friday night; that the depot agent on the next morning informed the plaintiffs that their lumber had arrived, when they requested him to have the same run up to the usual place of delivery, which he promised to do as soon as he could detach an engine from some passing train; that there was near to the place where the said cars loaded with said lumber were left standing a large hay press, filled with hay, which on Saturday night, by some means unknown to, and without any fault on the part of the defendant, caught fire and was burned up; that the fire was communicated from the burning hay to the lumber on the said cars, by means of

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which the lumber of the said Schell and plaintiffs was entirely consumed; and that it was inconvenient and dangerous to unload the lumber from the cars at the point where they were left standing on the said side track.

The question presented for our decision is, whether, under the facts and circumstances stated, the railway company is liable to the plaintiffs for the value of the lumber destroyed. The solution of which question depends upon whether the duty and liability of the defendant as a common carrier had terminated, and the duty and liability of the defendant as warehouseman had commenced, at the time when the lumber was destroyed. If the appellant had performed its whole duty as a common carrier, by placing the cars on the side track, at the place and in the manner stated, then its liability as such had ceased. As the appellant was in no manner responsible for the fire, it is very obvious that it is not liable as warehouseman.

We are referred by counsel for appellant to the following cases in this court, which they insist conclusively show that no liability attaches to the appellant upon the facts stated in the complaint and proved upon the trial: *Bansemmer v. The Toledo, etc., R. W. Co.*, 25 Ind. 434; *The Cincinnati, etc., R. R. Co. v. McCool*, 26 Ind. 140; *The Adams Express Co. v. Darnell*, 31 Ind. 20.

In the case first cited, the distinction between the duty and liability of common carriers and those of warehousemen is drawn with great clearness and accuracy. In that and the most of the adjudged cases, the property shipped consists of merchandise, which can be safely stored in the depot or warehouses provided for that purpose. In that case it was said to be the duty of a railroad company to erect depots or warehouses at places where goods are received and discharged, in which they may be safely stored, and to provide agents at such places for the transaction of the necessary business; that such warehouses constitute the proper places of delivery; that the consignees must be presumed to know

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that the goods are there discharged, and that it is their duty to receive them at that place.

It was further held in such case that "when the goods have reached their destination, the transit is at an end, and we think that when they are discharged from the cars, and, in the absence of the consignee or his agent to receive them, are safely stored in the warehouse, the liability of the company as a common carrier is then terminated, without notice to the consignee of their arrival. When the goods are thus safely stored, the character of a warehouseman attaches to the company, and as such it is required to keep the goods in store for the consignee for a reasonable time for him to receive and take them away, without additional reward. But, during such time, the railroad company is only liable as a warehouseman, for the want of that degree of care and diligence incident to that relation."

In the quotation made in that case from a leading English case, it is said that the rule applicable to carriage of goods by railroad "determines that they are responsible as common carriers until the goods are removed from the cars and placed on the platform," etc.

In the above case reference is made to a number of adjudged cases where it was held "that so soon as the goods arrive at their destination, or at the terminus of the road, and are unloaded and placed safely and securely in the railroad company's warehouse, the responsibility of the common carrier ceases, and that of warehouseman attaches."

The case referred to in 26 Ind. adheres to the ruling in the above case.

In the case cited in 31 Ind., which was an action against an express company for the loss of a package of money, and where the question was, whether the company was liable as a common carrier or bailee in deposit, the court say:

"It may not be possible always to fix the exact time when the carrier's responsibility as insurer ceases, and when he becomes a mere bailee in deposit or otherwise. But where, as is alleged here, the consignee has notice of the arrival,

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and the carrier is ready to deliver, it seems to accord with reason as well as authority that then the liability as carrier ends."

The liability of a common carrier is usually regulated and controlled by the terms of the contract between the parties, but in the absence of any express agreement, the usage and course of business have much weight in determining such liability. Redfield on Railways, vol. 2, p. 61, says:

"But this mode of delivery has no application to the ordinary business of railways as common carriers of goods. The transportation being confined to a given line, according to the ordinary and reasonable course of business, goods must be delivered and received at the stations of the company. And unless they adopt a different course of business, so as to create a different expectation, or stipulate for something more, there is no obligation to receive or deliver freight in any other mode. But where such companies contract to receive or to deliver goods at other places, or where such is the course of their business, they are undoubtedly bound by such undertakings, or by such usage and course of business."

Professor Parsons, in commenting upon the decision of the Supreme Court of Vermont in *Farmers & Mechanics' Bank v. Champlain Transportation Co.*, 23 Vt. 186, says: "All the cases, almost without exception, regard the question of the time and place when the duty of the carrier ends as one of contract, to be determined by the jury from a consideration of all that was said by either party at the time of the delivery and acceptance of the parcels by the carrier, the course of business, the practice of the carrier, and all other attending circumstances, the same as any other contract, in order to determine the intention of the parties." 1 Parsons Con. 661, and quoted in 2 Redf. Railways, 62, note 3.

It having been alleged in the complaint and proved upon the trial, that it had been the custom of the appellant, in previous shipments of lumber for the plaintiffs and Shell, to

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deliver the cars at or near their places of business, it is to be presumed that the contract of shipment of the lumber in question was made in view of, and in reference to, such custom or usage, and that the appellant was, by such contract, bound to deliver the cars at the place where it had been usual to deliver them. As has been seen, in the shipment of merchandise, the liability of the common carrier does not terminate until the goods are removed from the cars and delivered to the consignee, or placed in the warehouse provided for storing such freight, but we think the liability of the carrier, in the shipment of lumber, coal, or the like, would terminate, in the absence of a contract providing otherwise, when the car containing such lumber, coal, or the like, is placed where such articles are usually unloaded, or when the car is delivered at some safe and convenient place designated by the consignee, and notice of such delivery has been given. Such articles can not be securely stored in a warehouse, nor is it usual for railways to unload such articles. Where the articles shipped are such as cannot be safely deposited in a warehouse, and where the carrier is not required by contract or usage to unload the car, the delivery will be regarded as complete when the car is placed at the usual place of delivery or at some safe and convenient place designated by the consignee, and such consignee has received notice of such arrival and delivery. In such case the car so placed would be the equivalent of the warehouse, and the liability of a warehouseman would attach.

But there seems to be no room to doubt the liability of the appellant as a common carrier, because the local agent of the appellant recognized its obligation to run the cars down to the usual place of delivery, and agreed so to do, but before the agreement was carried out the lumber was destroyed by fire.

We think there was no error committed by the court below.

The judgment is affirmed, with costs.

Coleman v. White.

COLEMAN v. WHITE.

SEDUCTION.—Evidence.—Mitigation of Damages.—In an action for the seduction of the plaintiff's wife, it is competent for the defendant to prove, under an answer of general denial, in mitigation of damages, that owing to the wicked and depraved disposition of the plaintiff, he and his wife, before the alleged improper intimacy, lived unhappily together, that the plaintiff frequently cursed, abused, and struck her, and about three years before their final separation, drove her from his home, under threats of killing her.

From the Fountain Circuit Court.

S. F. Wood and *H. H. Dochterman*, for appellant.

PETTIT, J.—This suit was brought by appellee against appellant for seducing and debauching his, appellee's, wife, by the appellant.

Answer of general denial, trial by jury, verdict for appellee, plaintiff below, motion for a new trial overruled, excepted to, and judgment on the verdict for the plaintiff below.

The bill of exceptions shows that on the trial the appellant, defendant below, offered to prove by competent witnesses at the proper time the following facts: "That White and his wife lived together as husband and wife, and that before the alleged improper intimacy between the defendant and plaintiff's wife, the plaintiff and his wife lived unhappily together; that he frequently cursed and abused her, and often struck her; that at one time, about three years before their final separation, the plaintiff drove her from their home by beating her and by threats that he would kill her, at the time presenting a pistol at her, which caused her to fly from her home and her children; that this trouble grew out of the fact that the wife wanted one of the children to wash before coming to breakfast, and the husband determined it should not; that they afterward lived together again, but unhappily, until March, 1872, when they finally separated; that said trouble between the plaintiff and his wife existed on account of the wicked, depraved, and selfish disposition of the plaintiff, and not on account of any

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alleged improper intimacy between the defendant and plaintiff's wife."

This offered evidence was refused and rejected by the court, and the correctness of this ruling is the only question in the case before us. That the offered and rejected evidence was clearly admissible in mitigation of damages, there can be no doubt. Sedgw. Dam. 547; *Gilchrist v. Bale*, 8 Watts, 355; *Palmer v. Crook*, 7 Gray, 418; 1 Greenl. Ev. 117, sec. 102; 2 Hilliard Torts, 509; Hilliard Remedies, 398; Addison Torts, 899.

The judgment is reversed, at the costs of the appellee.

WIGGS v. KOONTZ.

PRACTICE.—*Supreme Court.*—*Assignment of Errors.*—Section 568 of the code (2 G. & H. 275) requires that the assignment of error must be entered on the transcript. Attaching a copy is not a compliance with the statute.

SAME.—*Bill of Exceptions.*—*Time of Filing.*—Where time has been given, beyond the term, for filing a bill of exceptions, the transcript must affirmatively show that it was filed within the time limited.

From the Randolph Circuit Court.

A. Jaqua and *I. P. Gray*, for appellant.

E. L. Watson and *L. J. Monks*, for appellee.

BUSKIRK, J.—This was an action by appellee against appellant upon a promissory note executed by the appellant to G. D. Wharton, and by him assigned to the appellee.

There was issue, trial by the court, and finding for appellee. Motion for a new trial overruled, and judgment on the finding.

It is insisted by counsel for appellee, that the record presents no question for our decision, and various reasons are assigned.

1. That there is no proper assignment of errors.
2. That the bill of exceptions is not in the record.

3. That, conceding that the bill of exceptions was filed within the time limited, it is so defectively copied into the transcript as to present no question.

There is an assignment of error on a loose and detached paper. There has been attached to the record with mucilage a paper indorsed a copy of the assignment of errors and a copy of the joinder in errors. In both the assignment and the copy, the names of the parties are transposed.

Thirty days time was granted the appellant to file a bill of exceptions. There is in the transcript, just preceding the bill of exceptions, a statement as follows: "And the defendant now comes, within the time granted by this court, and files this his bill of exceptions in this cause."

The judgment was rendered on the 9th day of April, 1872. There is no date to the bill of exceptions. The certificate of the clerk to the transcript is made on the 18th day of May, 1872. The transcript, including the certificate of the clerk, was completed without incorporating the bill of exceptions. The first certificate was erased, and the bill is then copied, and a new certificate made.

The bill of exceptions does not contain the evidence, but relates to the action of the court in overruling motions to suppress certain questions and answers in certain depositions and an application to make G. D. Wharton a party. The bill of exceptions contains in proper places the words [here insert]. The clerk, instead of inserting the said motions in the places indicated, has copied the motions into the transcript and has filled the places indicated in the bill of exceptions by a reference to the page in the record where such motions could be found.

It is very obvious that no question is presented by the record. Sec. 568, 2 G. & H. 275, requires that the assignment of error must be entered on the transcript. Attaching a copy of the assignment of errors can not be regarded as a compliance with the statute. The objection being made and insisted upon, the appeal must be dismissed.

It has been many times decided by this court that where

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time is given beyond the term for filing a bill of exceptions, the transcript must show affirmatively that it was filed within the time limited. This fact is usually shown by stating the time when the bill was filed. When the time of filing is shown, we are enabled to see and know for ourselves whether it was filed in time. We suggest to counsel, whether it is sufficient for the clerk to state that the bill was filed within the time limited, without giving the date.

As to the proper mode of inserting motions and documentary evidence into a bill of exceptions, see *Stewart v. Rankin*, 39 Ind. 161, and *Kesler v. Myers*, 41 Ind. 543.

The appeal is dismissed, at the costs of appellant.

BAILEY v. TROXELL.

PRACTICE.—Pleading.—Trial.—If a demurrer to a bad paragraph of a complaint has been overruled, and the record does not show that the trial was had exclusively under a good paragraph, the judgment will be reversed.

PLEADING.—Replevin.—Complaint.—A complaint in replevin that does not allege ownership of the property, but only alleges a promise of the defendant to vest the ownership in the plaintiff on certain conditions being complied with, is bad.

SAME.—Performance.—In pleading an offer to perform an agreement to pay the value of the pasturage of a horse until a certain time, it is not sufficient to say that a certain sum of money was tendered, without averring that it was a sufficient or reasonable compensation.

From the Grant Common Pleas.

J. Van Devanter and *J. F. McDowell*, for appellant.

A. Steele and *R. T. St. John*, for appellee.

PETTIT, J.—The appellee sued the appellant in replevin for a horse. The complaint was in two paragraphs, the first of which was clearly good, fully complying with the statutes of the State and the rules of pleading. The second was as

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130	381
43	432
165	582
43	432
171	316

follows: "For further complaint against said defendant, plaintiff says that heretofore, to wit, on the 17th day of June, 1871, he, said plaintiff, was indebted to the defendant in the sum of ninety-two dollars, being a judgment in favor of said defendant and against said plaintiff in the Grant Circuit Court, and that an execution issued on said said judgment. Said horse in the first paragraph of this complaint named was levied on, sold by the proper officers at public sale, and said defendant became the purchaser of said horse and one other for forty-five dollars, both levied on at the same time and for the same debt of the defendant; and plaintiff avers that after said sale, on the same day, said defendant agreed and contracted and promised said plaintiff that if he, said plaintiff, would pay said judgment in full, and would pay the same to the sheriff of Grant county, and pay said defendant the value of the pasture of the horses until the 15th of July, at which time plaintiff was to pay said judgment and pasturage, he, defendant, would redeliver said horse to the plaintiff. Plaintiff avers that he did pay said judgment, ninety-two dollars and fifty cents, to said sheriff on the 14th day of July, 1871, and on the said 14th day of July, tendered said defendant six dollars for said pasturage and demanded said horse, which defendant refused to deliver to plaintiff; and plaintiff brings said six dollars into court for said defendant; wherefore he demands judgment for the possession of said horse, and fifty dollars damages for his detention, and for other relief." If one paragraph of the complaint is bad, and the record does not show that the trial was had exclusively under a good paragraph, the judgment will be reversed. *Wolf v. Schofield*, 38 Ind. 175; *Keesling v. McCall*, 36 Ind. 321. This paragraph of the complaint was held good by the court below, and the correctness of this ruling is the only question before us in this case. We hold that the ruling was erroneous, and that this paragraph of the complaint was bad. It does not allege ownership of the property, but only a promise of the defendant to vest the

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ownership in the plaintiff on certain conditions. Bicknell Civil Pr. 505-6. It does not show a full performance of the conditions upon which the horse was to be delivered to the plaintiff, even if that would vest the title to the horse in him, which we do not hold, one of which was that he should pay for the pasturage of two horses till the 15th day of July. The plaintiff does not say that he did or offered to do this, but only that he tendered six dollars to the plaintiff, without saying that this was a sufficient or reasonable compensation for the pasture furnished. It is assigned for error that the court overruled a motion in arrest of judgment, but no such motion is in the record.

The judgment is reversed, at the costs of the appellee, with instructions to sustain the demurrer to the second paragraph of the complaint.

SILVERS v. THE JUNCTION RAILROAD COMPANY ET AL.*

From the Hancock Circuit Court.

W. March, for appellant.

M. E. Forkner and *E. H. Bundy*, for appellees.

PETTIT, C. J.—The submission is set aside for not complying with rule 19, in numbering the lines and making marginal notes.

* November term, 1872.

43	435
132	130
132	389
43	435
152	42
43	435
165	367

SILVERS v. THE JUNCTION RAILROAD COMPANY ET AL.

PRACTICE.—*Reply.*—*Form of Demurrer.*—*Joint and Several Demurrer.*—

A demurrer was filed to a reply, in the following language: "Now come the defendants in the above cause and demur to the second, third, and fourth paragraphs of plaintiff's reply to defendants' answer, upon the following grounds: 1st. said second paragraph does not state facts sufficient to constitute a defence to said answer, or to enable said plaintiff to recover; 2d, said third paragraph does not state facts sufficient to constitute," etc., (the same as the first, and as to the fourth paragraph the same).

Held, that the demurrer was good, and raised the question as to the sufficiency of the facts stated in the reply.

Held, also, that the demurrer was joint, and not several.

SAME.—*Form of Demurrer.*—To make a demurrer several, it is not necessary that it should be addressed in terms to each paragraph of the pleading to which it is filed. The use of the words *severally* and *each* will cause a demurrer to be treated as several. For proper forms of demurrer, see opinion.

SAME.—*Pleading.*—Each paragraph of a pleading must be perfect and complete within itself, and defective allegations in one paragraph cannot be aided by reference to another.

SAME.—*Trial.*—There cannot be a final judgment rendered against a plaintiff while there is one good paragraph of a reply undisposed of by demurrer or trial.

From the Hancock Circuit Court.

W. March, for appellant.

M. E. Forkner and *E. H. Bundy*, for appellees.

BUSKIRK, J.—This was an action by the appellant against the appellees, for the purpose of annulling and setting aside a conveyance of land executed by the appellant to the railroad company, upon the ground that such conveyance had been procured by false and fraudulent representations.

The complaint describes the land, states its value, the representations made and their falsity, the consideration of the conveyance, the offer to rescind, the tender back of the consideration, and the bringing of the same into court, the conveyance by the company to the other appellees, with full notice of the fraud, of certain portions of said real estate, and the waste committed on such lands. The prayer was for rescission of the contract and reconveyance of the lands or damages occasioned by the fraud.

Silvers *v.* The Junction R. R. Co. *et al.*

A demurrer was overruled to the complaint, and the appellees excepted.

The appellees jointly answered by the general denial.

The railroad company answered separately as follows:

“And for further answer of said defendant, she admits that the plaintiff under contract with said company conveyed the said lands described in the complaint, in consideration of receiving six hundred and fifty-one shares of the capital stock of said company, and one side check of eleven dollars, in all of the value of thirty-two thousand five hundred and sixty-one dollars; and she avers that she issued and delivered to the plaintiff, from time to time, at the request of the plaintiff, during the years 1853 and 1854, certificates of stock of said company, in number six hundred and fifty-one shares, and side check eleven dollars, in accordance with said contract; and she further avers that after the issue and delivery to him thereof, and before the commencement of said suit, he sold, transferred, and assigned two of said certificates of stock, covering four hundred and one shares, of the value of twenty thousand and fifty dollars, to one Alanson Marsh, and by request of the plaintiff the same was transferred on the books of the company to said assigns in accordance with the directions of said plaintiff, who now holds said certificates therefor, in his own right, and the defendant avers that the certificates of stock now by him brought into court, to the number of four hundred and one shares, with said complaint, to be delivered to the company, are not the same certificates issued by the company and delivered to the plaintiff by said company, under and in fulfilment of said contract, but different and other certificates; wherefore she is ready to prove said facts, she prays judgment, and she files copies of said returned certificates.”

The plaintiff replied as follows:

“The said plaintiff for reply to the second paragraph of the defendants’ answer says: 1. That said transfer of four hundred and one shares of stock to said Marsh was made on the — day of October, 1853; that previous to said transfer

of stock the plaintiff had not discovered the fraud alleged in the complaint or any part thereof, and had no reason to suspect that any such fraud had been practised upon him by said company; that at the time said transfer was made, the same was made in blank and delivered to one Woodruff, as collateral security for the payment of money then borrowed of him; that as soon as the plaintiff discovered said fraud, he went to the city of Cincinnati for the purpose of redeeming and procuring said stock from said Woodruff; that he ascertained that he was dead, and the plaintiff was unable to find or procure said stock or ascertain where the same was, and has never been able to procure or find the same, though using all possible diligence to do so; that he never knew or heard of said Marsh, or of his having any claim to said stock before the filing of said answer, at the present term of this court.

"2. That previous to the death of said Woodruff, the plaintiff had paid to him a large portion of the money so borrowed of him, and the remainder exists as a debt against the plaintiff, and he has never received anything of value for said stock, except in the manner above stated; that the remainder of the stock filed with the complaint is the identical stock issued by said company to the plaintiff on the contract stated in the complaint.

"3. That the said stock of said company, since the discovery of said fraud by the plaintiff, has never had any appreciable value, but has been and still is entirely worthless, nor is there any reasonable probability of its being of any value.

"4. That said stock of four hundred and one shares were by some person to the plaintiff unknown, after the death of said Woodruff, voluntarily surrendered to said company without any consideration whatever."

The defendants filed the following to the reply:

"*Sillers v. Junction R. R. Co. et al.*

"Now come the defendants in the above cause and demur to the second, third, and fourth paragraphs of plaintiff's

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reply to defendants' answer, upon the following grounds: 1st. Said second paragraph does not state facts sufficient to constitute a defence to said answer, or to enable said plaintiff to recover.

"2d. Said third paragraph does not state facts sufficient to constitute a defence to said answer, or to enable said plaintiff to recover.

"3d. Said fourth paragraph does not state facts sufficient to constitute a defence to said answer, or to enable plaintiff to maintain his said action."

The demurrer was sustained to the second, third, and fourth paragraphs of the reply, and appellant excepted.

Thereupon the defendants withdrew their general denial, and plaintiff refusing to plead further, final judgment was rendered for the defendants.

The appellant has assigned for error the sustaining of the demurrer to the second, third, and fourth paragraphs of the reply.

There is no assignment of cross errors, nor have we been favored with a brief by the appellees. ●

Various positions are assumed by counsel for appellant, which we will dispose of in their order, if it shall become necessary to consider them all.

The first is, that the paper which purports to be a demurrer is not a demurrer in form or substance; and in support of this position reference is made to the following adjudged cases in this court: *Tenbrook v. Brown*, 17 Ind. 410; *Barner v. Morehead*, 22 Ind. 354; *The C. & C. R. R. Co. v. Washburn*, 25 Ind. 259; *Kemp v. Mitchell*, 29 Ind. 163; *Porter v. Wilson*, 35 Ind. 348.

In the case cited in 17 Ind., the following was the form of the demurrer: "Comes now said plaintiff and demurs to the second paragraph of the defendant's answer, and says that the same is not sufficient in law to enable the defendant to sustain his said defence, or to bar the plaintiffs' complaint;" and it was held, that as the demurrer assigned none of the

six statutory causes, it was bad and presented no question of law.

The case cited in 22 Ind. involved the question of whether the demurrer was joint or separate, and will be considered in another portion of this opinion.

In the case referred to in 25 Ind., the demurrer was, that the facts alleged did not "entitle the plaintiff to the relief demanded," and the court held that our statute does not warrant a demurrer for that cause, and expressly requires such an one to be overruled.

The second ground of demurrer in the case relied upon in 29 Ind. was, that the same was not sufficient in law to entitle the plaintiff to the relief demanded. The court say: "The second cause of demurrer raises no question whatever; it is unknown to our laws, and the code is plain that a demurrer assigning only such a cause must be overruled.

In *Porter v. Wilson*, *supra*, the form of the demurrer was, that the several paragraphs "are not good and sufficient in law," and it was held to raise no question for the consideration of the court. The court say: "It is not equivalent to a statement that the pleading does not state facts sufficient to constitute a cause of action, nor is it any one of the statutory causes of demurrer. The statute enumerates and defines six causes of demurrer, and provides that for no other cause shall a demurrer be sustained."

It is very obvious that the form of demurrer in the case in judgment is very different from those in the above cases. In none of them was there an attempt to follow the form prescribed by the code. The most of them seem to have been modelled after the form used in *Lane v. The State*, 7 Ind. 426, although that was held bad about eighteen years ago.

In *Pace v. Oppenheim*, 12 Ind. 533, the demurrer was, that "the complaint does not contain facts enough to entitle the plaintiff to relief," and it was held to be in substantial compliance with the fifth specification of section 50 of the code.

In *Stanley v. Peebles*, 13 Ind. 232, the cause of demurrer was, that the complaint "does not contain and set forth suffi-

Silvers v. The Junction R. R. Co. *et al.*

cient facts to enable the plaintiffs to sustain said action," and was held to substantially conform to the statute.

In *Lagow v. Neilson*, 10 Ind. 183, and in *The State v. Leach*, 10 Ind. 308, a very liberal rule was laid down. It was held that a demurrer pointing out substantially any one of the six defects mentioned was a substantial compliance with the statute.

By section 50 of the code, 2 G. & H. 77, it is provided, that "the defendant may demur to the complaint when it appears upon the face thereof, either,

"First. That the court has no jurisdiction of the person of the defendant, or the subject of the action; or,

"Second. That the plaintiff has not legal capacity to sue; or,

"Third. That there is another action pending between the same parties for the same cause; or,

"Fourth. That there is a defect of parties, plaintiff or defendant; or,

"Fifth. That the complaint does not state facts sufficient to constitute a cause of action; or,

"Sixth. That several causes of action have been improperly united.

"And for no other cause shall a demurrer be sustained; and, unless the demurrer shall distinctly specify and number the grounds of objection to the complaint, it shall be overruled."

Section 64 of the code, 2 G. & H. 92, reads as follows: "Sec. 64. Where the facts stated in the answer are not sufficient to constitute a cause of defence, the plaintiff may demur to one or more of several defences, under the same rules and regulations as heretofore prescribed for demurring to the complaint."

Section 67 of the code, 2 G. & H. 94, is as follows: "Sec. 67. When the answer contains new matter, the plaintiff may reply thereto, denying each allegation controverted by him or any knowledge or information thereof, sufficient to form a belief; and he may allege in plain and concise lan-

guage, without repetition, any new matter not inconsistent with the complaint, and constituting a defence to the answer; the defendant may demur to a reply for any of the causes specified for demurring to a complaint."

The principal difficulty seems to be in preparing a demurrer so as to conform it to the fifth cause of demurrer, as specified in section 50.

It should be observed that by section 64, the cause for which a plaintiff may demur to an answer is, that the facts stated are not sufficient to constitute a cause of defence; and that in section 67, the plaintiff may set up "any new matter not inconsistent with the complaint and constituting a defence to the answer.

The correct form for a demurrer based upon the fifth specification of section 50, whether to the complaint, answer, or reply, is as follows:

1. That the complaint does not state facts sufficient to constitute a cause of action.
2. That the answer does not state facts sufficient to constitute a cause of defence.
3. That the reply does not state facts sufficient to constitute a defence to the answer.

A demurrer in the above form would reach any defect in the statement of the facts, either in the complaint, answer, or reply, and would present for the decision of the court the sufficiency of the facts so stated; but where such statement is omitted, and the demurrer proceeds to point out a fact necessary to constitute a cause of action or defence which is not alleged in the complaint, answer, or reply, it seems to be substantially the same thing so far as it goes, only it is more specific as to the objection, and would not cover any objection other than that specifically pointed out, although there be other necessary facts not stated, that would have been reached had the language of the statute been employed. *The State v. Leach*, 10 Ind. 308.

It has been held in all the adjudged cases since the code was adopted, that a demurrer for the cause stated in the fifth

specification is good when expressed in the language of the statute, but there has been much conflict, as is shown in the cases hereinbefore reviewed, where other language has been employed. It is, therefore, much safer to employ the language of the statute.

It is provided by section 800 of the code, that "the provisions of this act shall be liberally construed, and shall not be limited by any rules of strict construction." 2 G. & H. 336.

There are some useless words employed in the demurrer under examination, such as "or to enable said plaintiff to recover," and "or to enable plaintiff to maintain his said action," but they will not vitiate the other portions. Omitting such phrases the demurrer is in substantial, if not exact, compliance with the statute. We are of opinion that the demurrer was good and raised the question as to the sufficiency of the facts stated in the reply.

It is in the next place insisted that the demurrer is joint, going to the whole reply, and not several, going to each paragraph separately, and that it was error to sustain it if any one of the paragraphs was good.

In *Lane v. The State, supra*, a demurrer in the following language was held to be joint:

"The plaintiff demurs to the first, second and third paragraphs of defendant's answer, for the following grounds of objection: that they are insufficient in law to constitute a legal defence to the action."

The court say: "Does the demurrer, in this instance, conform to the provisions of the practice act? We are of opinion that it does not, because it includes neither in terms nor in substance any of the statutory causes of demurrer. Nor does it specify and number the grounds of objection to the answer. It is a general demurrer, unknown to our present practice, addressed to three paragraphs or answers collectively, without any specification as to the particular defects of either."

In *Barner v. Morehead*, 22 Ind. 354, the demurrer was thus:

"Said plaintiff comes and demurs to the first, second and third paragraphs of the defendant's answer, and each of them, for the following grounds of exception, viz.: that said paragraphs of defendant's answer do not state facts sufficient to constitute a defence."

The court held that the demurrer should be treated as joint, and not several, and if any one of the answers so demurred to was good, the demurrer should be overruled.

In *Fewett v. The Honey Creek Draining Co.*, 39 Ind. 245, a demurrer in the following form: "The plaintiff demurs to the fifth and sixth paragraphs of defendants' answer, and to the second amended paragraph of answer," was held joint and void, because it assigned no cause whatever for the demurrer.

This court in *Parker v. Thomas*, 19 Ind. 213, uses the following language:

"Should the cause be reversed because of the overruling of the demurrer to the second paragraph? Here arises a question of practice. The demurrer was as follows: 'The plaintiff demurs to each paragraph of the answer,' etc. The appellee insists that the demurrer was properly overruled if there were any good paragraphs. We think, however, that the demurrer should be taken distributively, and that it is equivalent to a separate demurrer filed to each paragraph. It might well be overruled as to some and sustained as to other paragraphs. It is not like a demurrer that must be wholly sustained or overruled."

In *Fankboner v. Fankboner*, 20 Ind. 62, the demurrer was as follows: "Comes now the plaintiff and demurs severally to the second, third, fourth, fifth, sixth, and seventh paragraphs of the defendant's answer, for cause," etc.

The court said: "But it is claimed that the demurrer was a joint demurrer to the whole of the paragraphs to which it was filed, and hence should have been overruled, if any one of them was good. The demurrer, we have seen, was to these paragraphs severally. The case can not be distinguished

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from that of *Parker v. Thomas*, at the last term, where it was held that a demurrer to each paragraph operated distributively, and had the same effect as if a separate demurrer had been put in to each paragraph. So here, one demurrer is put in severally, and should have the same effect. The case differs from that of *Brown v. Gooden*, 16 Ind. 444, which is cited. There the demurrer did not profess to be filed 'severally or separately' to each paragraph, but to the whole answer."

In *Aiken v. Bruen*, 21 Ind. 137, the demurrer was severally to each paragraph and assigned for cause that said paragraphs are severally insufficient to constitute a defence to the action, and the court held that the demurrer must be taken as a separate demurrer to each paragraph.

The court said: "If the counsel had assigned for cause, that the paragraphs, severally, did not contain facts sufficient to constitute a defence, he would have added but little to his labor in drafting the demurrer, and relieved himself from considerable in answering objections to the demurrer as drawn."

In *Hume v. Dessar*, 29 Ind. 112, where the plaintiff demurred separately to the first, second, third, and fourth paragraphs of the answer, because neither of said paragraphs states sufficient facts, etc., the court held the demurrer to be several.

The rule seems to be well settled that it is not necessary, to make a demurrer several, that it should be addressed in terms to each paragraph of the pleading to which it is filed. The use of the words *severally* and *each* will cause a demurrer to be treated as several, although it is not separately addressed to each paragraph. Much confusion, delay, and expense would be saved if some recognized form was adhered to by counsel. It is always the better practice to make a demurrer several. There is nothing gained, and frequently much inconvenience results, from a joint demurrer. From the adjudged cases in this court, since the adoption of the code, there is no room to doubt that a demurrer in the following form, under the fifth specification, would be held to be a

several demurrer: Comes now the defendant and demurs separately and severally to each paragraph of the complaint and for cause of demurrer says, that neither of said paragraphs contains facts sufficient to constitute a cause of action. A demurrer to the answer or reply in the same form, with a change of phraseology, so as to adapt it to the particular pleading, would in like manner be treated as several.

Making an application of the principles enunciated in the foregoing cases to the case in judgment, we are of the opinion that the demurrer under examination must be regarded as joint and not as several. The language of the demurrer is, that the defendants demur to the second, third, and fourth paragraphs of plaintiff's reply to defendants' answer, upon the following grounds, etc. It does not say that they demur separately and severally to each paragraph of the reply, but it is to the three paragraphs. It is true that in a statement of the causes of demurrer, they are stated separately to the three paragraphs, but this can not make the demurrer several when it is addressed to three paragraphs collectively and not severally. When the demurrer is made several by the use of the words separately, severally, and each, then one or several causes of demurrer may be stated. The demurrer is joint, while the causes are assigned separately to the three paragraphs.

We proceed to inquire whether the court erred in sustaining the demurrer to the second, third, and fourth paragraphs of the reply; and at the threshold of the inquiry we are greatly embarrassed in determining whether the reply should be regarded as consisting of one paragraph in a legal sense, subdivided into four grammatical paragraphs, or whether it consists of four paragraphs in a legal sense. The parties and the court below seem to have treated the reply as consisting of four paragraphs within the meaning of the code. The demurrer was directed against the second, third, and fourth paragraphs. There was no demurrer to what was regarded as the first paragraph. Regarding the reply as consisting of four paragraphs, it is very obvious that neither of them

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was good. Neither of them was complete within itself, and neither separately considered stated facts sufficient to constitute a defence to the answer. The first and second paragraphs, when taken together, would present the question whether the surrender by Marsh to the railroad company of the four hundred and one shares of stock issued to the plaintiff and by him assigned, and the tender by the plaintiff of four hundred and one shares of other stock issued by the company to other persons and by them assigned to plaintiff, would constitute such a tender as would entitle the plaintiff to a rescission of the contract; but taken separately they present no question. The third, if constituting a part of the first, would raise the question whether it was necessary to make a tender of stock that possessed no value, but considered separately it is wholly unintelligible. Unless it is read in connection with and as constituting a part of the first, there is nothing to show that it has any connection with the case. The fourth, whether considered separately or in connection with the other paragraphs, does not seem to constitute any defence to the answer. Each paragraph must be perfect and complete within itself, and defective allegations in one paragraph can not be aided by reference to another; but in the present case there is not even a reference to the other paragraphs. There is nothing but the figures 1, 2, 3, and 4, that indicate any purpose of making more than one paragraph of the reply. Regarding the reply as consisting of four paragraphs, there was no error in sustaining the demurrer to the second, third, and fourth. Regarding it as consisting of one paragraph, it may, perhaps, constitute a good defence to the answer, but it was not so treated in the court below, nor has the questions arising upon the demurrer to the reply, which would reach back to, and call in question the sufficiency of, the answer and the complaint, been discussed with such fulness and completeness as their importance and difficulty require. The brief of counsel for appellant is mostly devoted to the discussion of questions of practice, while the appellees have no brief. There is another

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very strong reason why we should not now examine the questions arising upon the demurrer. Regarding the reply as consisting of four paragraphs, there was no demurrer to the first paragraph. The appellees, by the failure to demur to that, conceded that it constituted a good defence to the answer. There could not be a final judgment rendered against the appellant, while there was one good paragraph of the reply undisposed of by demurrer or trial. We should, therefore, be compelled to reverse the judgment without reference to the questions arising on the demurrer. It seems to us that great injustice would be done to the parties by deciding the case upon the record as it now stands, and that the ends of justice demand that the cause should be remanded, when the pleadings can be amended, and the questions can be fairly and intelligibly presented.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to permit an amendment of the pleadings, and for further proceedings in accordance with this opinion.

BARTLETT v. ADAMS.

DEMAND.—Waiver.—Where a demand is necessary before bringing suit, if, when a demand is made, a specific objection is made as a reason for not complying with the demand, all other objections, which if made might be readily obviated, are waived.

SAME.—Partition Fence.—Where a defendant had enclosed his theretofore unenclosed land, and by so doing a fence owned by the plaintiff became a partition fence, and the plaintiff thereafter called upon the defendant and demanded pay for one-half of the value of such partition fence, and the defendant did not object that the value had not been estimated, but denied his liability and stated that he would pay no amount whatever, such refusal waived an estimate of the value as a prerequisite to the maintenance of an action.

48	447
159	263
48	447
168	118

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From the Henry Circuit Court.

J. Brown, J. M. Brown, L. Benson, and R. L. Polk, for appellant.

M. E. Forkner and E. H. Bundy, for appellee.

OSBORN, J.—This was an action to recover one-half the value of a partition fence. It was commenced before a justice of the peace. It is alleged in the complaint, that the parties to the action are the owners of adjoining land; that the appellant, who was the plaintiff below, built a fence along the line dividing their land, after which the appellee enclosed his land, making the fence so built by the appellant a partition fence; that the appellee refused to keep up his part or pay appellant for the fence.

Judgment was rendered for the plaintiff before the justice. The defendant appealed to the circuit court, where there was a jury trial, verdict for defendant, motion for a new trial overruled, exceptions and final judgment on the verdict against the plaintiff. The error assigned is in overruling the motion for a new trial.

A bill of exceptions sets out all the evidence and the instructions given and refused.

The court instructed the jury that the plaintiff could not recover, unless before bringing the action he had estimated the value of the fence, and notified the defendant of the value of one-half of it, and that the defendant had refused to pay the same; that a demand upon the defendant to pay one-half of the value of the fence, without stating the amount of his estimate of one-half of the value thereof, and a refusal to pay by the defendant, would not be sufficient; that it was the duty of the plaintiff, before bringing the suit, to estimate the amount of half the value of the fence, and notify the defendant of such value, and if he had not done so, the jury must find for the defendant; that before the plaintiff could recover one-half the value of the fence in controversy, it was incumbent upon him to prove that prior to the bringing of the action, he made a demand upon the

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defendant for a specific sum, as his estimation of one-half the value of the fence.

The court refused to instruct the jury, that if they believed from the evidence that the defendant enclosed his theretofore unenclosed land, and by so doing, a fence owned by the plaintiff thereby became a partition fence, and that the plaintiff, after such enclosure had been made, called upon the defendant and demanded pay for one-half of the value of such partition fence, and thereupon the defendant stated that he would pay no amount whatever, such refusal would dispense with any estimate being made by the plaintiff as a prerequisite to the maintenance of the action.

Sec. 20, 1 G. & H. 344, reads as follows: "When, by inclosure of uninclosed land, a fence already erected shall become a partition fence, the person making such inclosure shall pay to the owner of the fence the value of one-half of the same, as estimated by the owner." Sec. 21 reads as follows: "If he refuse, the owner may bring suit for the same. But if the person making the inclosure shall have tendered to him before trial, an amount equal to, or larger than the damages awarded, together with costs accrued up to the date of tender, the owner of the fence shall pay costs, and have only the damages assessed."

Conceding, without deciding, that the appellee was not bound to pay the owner of the fence the value of one-half of the same, until he had estimated it and notified him of the amount, we think he could waive it. The general rule in such cases is, that, if when a demand is made, a specific objection is made as a reason for not complying with the demand, all others, which if made might be readily obviated, are waived. *Emlden v. Augusta*, 12 Mass. 307. The notice in that case by the overseers of the poor of the town of Emlden to the overseers of the town of Augusta was held to be too general, but it was also held that it was waived by making the point in dispute the settlement of the paupers. In *Gerrish v. Norris*, 9 Cush. 167, it was held

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that "if a party, who is, by his covenant, bound to receive a deed from another, makes specific objections to the deed, this is a waiver of all others that are of such a nature that, if stated by the party, they might have been obviated by him who was to deliver the deed." In *Francis v. The Ocean Insurance Company*, 6 Cow. 404, it was held in an action upon a policy of insurance upon a ship, that if the underwriters, when applied to for payment for a total loss, replied, that they would not settle the claim in any way, it was a waiver of preliminary proof of interest in the assured. See *Hawes v. Coombs*, 34 Ind. 455.

If the appellee, when called upon to pay for one-half of the value of the fence, did not object that the value had not been estimated, but denied his liability, and stated that he would pay no amount whatever, we think that was a waiver of the estimate of the value of the fence by the appellant. It was an avowal that he resisted the payment upon the ground that he was not liable to pay anything, and not because the amount was not estimated.

The instruction should have been given.

The judgment of the said Henry Circuit Court is reversed, with costs, with instructions to grant a new trial, and for further proceedings in accordance with this opinion.

MONTGOMERY v. HAMILTON ET AL.*

From the Shelby Common Pleas.

K. M. Hord and *A. Blair*, for appellant.

S. Major and *A. Major*, for appellees.

PETTIT, C. J.—The submission in this case is set aside for not complying with rule 19, in not numbering the lines of the pages of the transcript.

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We suggest to counsel that they might improve their briefs by a better chirography and plainer, fuller, and more accurate reference to authorities.

* November term, 1872.

MONTGOMERY v. HAMILTON ET AL.

PRINCIPAL AND SURETY.—*Extension of Time.—Promise of Surety after Extension.*—Where the payee of a note has, for a good consideration, given an extension of the time of payment to the principal, without the consent of the surety, a promise afterward made by the surety to pay the debt, made in ignorance of the fact that the time of payment had been extended by the payee, is not binding on the surety.

PLEADING.—*Complaint to Review.—Principal and Surety.—Extension of Time.*—A complaint by a surety to review a judgment rendered upon a promissory note, and to restrain the levy of an execution, alleging that he suffered judgment to go by default, not knowing that he had any defence to the action, but that since the execution issued, he had for the first time learned that the payee of the note had, on divers occasions, taken interest in advance and extended the time of payment to the principal, without the knowledge of the surety, was held good.

BILL OF EXCEPTIONS.—Where the evidence is not all in the record, this court cannot say that the finding is not supported by the evidence.

From the Shelby Common Pleas.

K. M. Hord and A. Blair, for appellant.

S. Major and A. Major, for appellees.

PETTIT, J.—This suit was brought by the appellant against the appellees, and we give an abstract of the complaint as appellant's attorneys have given it to us. "This was an action commenced by Montgomery against Hamilton, as judgment plaintiff, and Hoop, sheriff of Shelby county, to review a judgment of the Shelby Common Pleas in favor of Hamilton, and to restrain the sheriff from proceeding to execute a writ against the property of Montgomery; that a judgment was taken against James Winterrowd and

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Andrew J. Winterrowd as principals and himself as surety by default, because at the time he knew of no defence, and he called upon one of the principals in the note who informed him there was no defence to the note, and that under these circumstances he permitted judgment to go by default; that after the rendition of the judgment, and while an execution was in the hands of Hoop, sheriff of the county, he learned for the first time, that Hamilton had, on divers and sundry occasions, taken interest in advance and extended the time of payment to the principals without his knowledge, and thereby discharged him from his obligation."

A demurrer for want of sufficient facts was filed to the complaint, overruled, and exception taken.

The answer was, first, a general denial by both defendants. Hamilton answered separately, in three paragraphs. 1. Admits the judgment on the note, execution thereon, and that it is not paid, but denies all other allegations in the complaint. 2. "The defendant says that after the expiration of the time of the alleged extension of payment of the note mentioned in the plaintiff's complaint, to wit, on the the 20th day of March, 1869, this defendant called upon the plaintiff, Montgomery, and presented said note to him for payment, and then and there demanded payment thereof. And this defendant says that the said Montgomery then and there promised to see the said Winterrowds within a few days thereafter, and with them would pay this defendant this note; that a few days thereafterward said Montgomery called upon this defendant and requested him not to sue on said note, at the April term, 1868, of the Shelby Circuit Court, and then promised this defendant that if he would forbear suing on said note at said April term, 1868, of said circuit court, he, said Montgomery, would pay said note within thirty days thereafter, which this defendant then and there promised to do; that in pursuance of said agreement between the said plaintiff and this defendant, he did forbear to sue upon said note until after the expiration of said time so agreed with said Montgomery; yet to pay the same the

said Montgomery and said Winterrowds wholly failed, and that at the next term, July, 1868, of this court he brought his action upon said note and obtained the judgment stated in the plaintiff's complaint, which together with the costs of suit thereon, taxed at twenty dollars, remains wholly unpaid; wherefore he sues and demands judgment." The conclusion of this answer is awkward. The defendant does not sue by this answer, though he may demand judgment. A demurrer to this paragraph of the answer, for want of sufficient facts, was overruled, and exception taken, and a reply of general denial was filed to it. Third paragraph of Hamilton's answer: "that after the rendition of said judgment, this defendant procured to be issued by the clerk of the Shelby Common Pleas Court an execution of *fieri facias* on said judgment and placed in the hands of the sheriff of said county to be executed, and while said execution was so in the hands of said sheriff to be by him executed, to wit, on the — day of July, in the year 1869, the said Montgomery promised said Hamilton, in consideration that said Hamilton would not levy on property under said execution to satisfy said judgment, he, said Montgomery, would pay to said Hamilton the amount of said judgment, on the 15th day of August, 1869. The said Hamilton avers that thereupon he directed said sheriff to not levy on property under said execution, and that said sheriff did not levy on property on said execution; that said Montgomery did not, nor did any one else pay off said judgment within said 15th day of August, 1869, nor at any other time; wherefore the said Hamilton prays judgment."

There was a reply to the third paragraph of the answer: 1. General denial. 2. Ignorance of the matters stated in the complaint, by which he was released from liability on the note at the time of making the new promise.

We hold that the second paragraph of the answer of Hamilton was insufficient, and that overruling the demurrer to it was an error for which the judgment must be reversed. It does not show that Montgomery had notice or knew that

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he had been released from his liability on the note by reason of the extension of time given by Hamilton to the principals; for if he made the promise in ignorance of the fact that Hamilton had extended the time of payment for interest paid in advance by the principals, he can not be bound by such promise. The authorities are numerous and uniform on this question, some of which we cite. *May v. Coffin*, 4 Mass. 341; *Freeman v. Boynton*, 7 Mass. 483; *Silvernail v. Cole*, 12 Barb. 685; *Ross's Ex'r v. McLauchlan's Adm'r*, 7 Grat. 86; 1 Parsons Notes & Bills, 201-2; *Southall v. Rigg*, 11 C. B. 481; *Mercer v. Clark*, 3 Bibb, 224; *Garland v. Salem Bank*, 9 Mass. 408; 1 Parsons Notes & Bills, 246; *Corbett v. The State of Georgia*, 24 Ga. 287; 2 Parsons Notes & Bills, 597. *Rittenhouse v. Kemp*, 37 Ind. 258, may also be cited; though not in itself directly in point, some of the authorities cited on examination are found to be so. The counsel for the appellee in their brief do not insist that the second paragraph of Hamilton's answer was good, but argue that the complaint was bad, and that the demurrer to it should have been sustained, and that the demurrer to the second paragraph of Hamilton's answer should have been carried back and sustained to the complaint. We have all carefully examined the complaint, and though not very artistically drawn, we hold that it is sufficient, and that the demurrer to it was properly overruled.

There is but one remaining question before us, and that is, does the evidence sustain the finding and judgment? So far as the evidence is in the record, we think it reasonably sustains the finding and judgment; but the bill of exceptions shows that the evidence is not all before us. The bill of exceptions shows that there was a memorandum on the note, yet the transcript shows no such memorandum. The bill of exceptions further shows this: "Suits of Samuel Hamilton v. Andrew Winterrowd et al., commenced in Shelby Circuit Court, March 27th, 1868, and answer of sureties there filed, 13th of April, 1868, introduced." This shows that evidence as to certain suits was introduced which is not in the tran-

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script; and as all the evidence in the case is not before us, we can not say that the court did not find properly on the evidence.

The judgment is reversed, at the costs of the appellees, with instructions to sustain the demurrer to the second paragraph of Hamilton's answer.

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43	455
130	108
43	455
164	434

PRIVATE ROAD.—Petition.—Land-Owners.—In an action to recover damages and to restrain the defendant from tearing down fences and opening a private road through the land of the plaintiff, the name of the plaintiff being mentioned in the petition for the road;

Held, that the plaintiff could not attack the validity of the proceedings to establish the road on the ground that the names of all the owners of lands over which the road was to pass were not mentioned in the petition.

SAME.—Notice.—Jurisdiction.—That notice has been given of a petition for the opening of a private road, is a jurisdictional fact that must be proved, before the board of commissioners can act on the petition; and if the record shows a finding that due notice was given, it is conclusive.

SAME.—Constitutional Law.—Eminent Domain.—The statute authorizing the location of private roads, as far as it provides for the exercise of the right of eminent domain to establish them, is unconstitutional.

From the Posey Common Pleas.

A. P. Hovey and *G. V. Mensies*, for appellant.

W. Harrow, *W. M. Hoggatt*, and *J. H. Laird*, for appellees.

OSBORN, J.—This was an action by the appellant to recover damages, and to restrain the appellees from tearing down his fences, and opening a pretended private road through his land.

Two questions are presented for our consideration: 1st. The regularity of the proceedings of the board of county commissioners of Posey county in establishing the road.

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2d. The constitutionality of the law under which it was established.

The petition for the road was signed by twenty-nine freeholders of the county, six of whom resided in the immediate neighborhood of the proposed private road. It asked "for the location of a private road in Marr's township of said county," upon a route specified. It stated that it would pass over the land of the appellant, Lawrence Miller's heirs, Andrew Deig's heirs, and others, naming them.

The petition was presented to the board of commissioners at a regular session. The board acted upon it and made the following order: "Which petition after being publicly read, and no person objecting thereto, and the board being satisfied, from the evidence produced, that due notice had been given by putting up at least three public notices along the line of said proposed route, do therefore order that the road described in the foregoing petition be opened to the width of sixteen feet, and that the expense of opening said road be collected from the parties for whose benefit said private road is opened, and that the county auditor give the necessary notice to the township trustee through whose township said road runs."

It is insisted that the petition was invalid, because it did not contain the names of all the owners * * * of land over which the road was to run; and *Hays v. Campbell*, 17 Ind. 430, and *Hughes v. Sellers*, 34 Ind. 337, are cited. We hold that the proceedings are valid, when they are attacked as in this case, and when the name of the person making the attack is mentioned in the petition. We do not hold that the petition would be good in an appeal from the action of the board of commissioners, nor that the proceedings would be valid against an owner not named in the petition. We do not pass upon either of these questions.

It is also objected, that the notice given was not sufficient. The complaint alleges that no notice was given to the appellant of the application for the road, and a copy of a notice, alleged to have been proven before the board, accompanies

the complaint. The name of the appellant does not appear in that.

Proof of notice was a jurisdictional fact. Until that was shown, the board could not act. The record shows that due notice was given, and that is conclusive. *Little v. Thompson*, 24 Ind. 146; *Wright v. Wells*, 29 Ind. 354; *Kissinger v. Hanselman*, 33 Ind. 80.

The main question in the case is the constitutionality of the law authorizing the location of private roads.

The case of *Kissinger v. Hanselman*, 33 Ind. 80, is cited as deciding the question in favor of the law. In that case, the petition was for "a certain private road for the purpose of having access to the burial ground known as," etc. The commissioners ordered the road to be opened by the appellee (the applicant for the road) on payment of damages; the damages were paid and the road opened, and the defendant obstructed the road. The court said, that "the road in question was a public highway, and, consequently, that the questions most pressed for the appellant are not in the case." That if it was only a private road, then half the highways in the State were of that class; void in their inception, if the right of eminent domain could not be exercised to take land for them, and not in any respect under the jurisdiction of the local authorities, nor to be opened or kept in repair by the public.

From the language used by the court in that case, we think the proviso in the section providing for private roads must have been overlooked. I G. & H. 366, sec. 49. In that proviso it is declared that the petitioner "shall open and keep in repair such road at his own expense." That section was amended by an act approved March 9th, 1861. 3 Ind. Stat. 290. By that act any person or persons might have a private road laid out, * * * under regulations provided by law for the location * * * of highways, so far as such regulations might be applicable: "Provided, that such board of commissioners may order such private road to be laid out, * * * without any

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view, if there be no remonstrance against such petition: Provided further, that such petitioner or petitioners asking such road shall open and keep in repair such road at his or their own expense, and that such road may be either dirt, plank, macadamized, gravel, or railroad."

We think it manifest that the theory of the court was, that the public were to open the road and keep it in repair, and that it was under the jurisdiction of the local authorities, whereas by the statute such was not the case.

Mr. Angell, in his work on the law of highways, says: "The word 'way' is derived from the Saxon, and means a right of use for passengers. It may be private or public. By the term 'right of way,' is generally meant a private way, which is an incorporeal hereditament of that class of easements, in which a particular person, or particular description of persons, have an interest and a right, though another person is the owner of the fee of the land, in which it is claimed." Angell Highways, 1, 2. "Highways are public roads, which every citizen has a right to use." *Id.* 3. "A passage, road, or street, which every citizen has a right to use." Bouv. Law Dict.

The act to provide for the opening of highways recognizes and calls all public roads highways, and in all such cases viewers must be appointed; and before the commissioners can order the road to be opened as a highway, such viewers must find that it is of public utility. A private road is called a "private road" as contradistinguished from a public road or highway. No viewers are required unless a remonstrance is filed. When a highway is located, the board of commissioners shall order it opened and kept in repair, and the order shall be transmitted to the trustee of the township in which the location is made; and the trustee shall notify the proper supervisor to work the road. 1 G. & H. 393, sec. 18. When a private road is located, the petitioners shall open and keep it in repair at their own expense. They get no credit for the work done upon such road. It is made a penal offence to obstruct a public highway, and supervisors

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are liable to be fined for failing to keep the highways in their districts in repair. The statutes of this State recognize the distinction between public and private roads. One is for the use of the public and must be maintained at public expense; the other is, as its name indicates, private, for the use of the particular persons for whose benefit it is located, and must be maintained at their expense. It is not for, and cannot be used by, the public.

The constitutionality of the provision depends upon the power of the legislature to authorize the appropriation under the right of eminent domain. In the case of *The Water Works Co., etc., v. Burkhart*, 41 Ind. 364, it was said, that "the right of eminent domain, that is, the ultimate right of the sovereign power to appropriate, not only the public property, but the private property of all the citizens within the territorial sovereignty, to public purposes, is inherent in the government. * * * It is to be exercised only when the public exigencies require it. * * * If the legislature attempts, under the power of taking property under the right of eminent domain, to take property confessedly not for public use, then the courts may prevent it." Mr. Cooley, in his work on Constitutional Limitations, says: "It is conceded on all hands that the legislature has no power, in any case, to take the property of one individual and pass it over to another without reference to some use to which it is to be applied for the public benefit. * * * It seems not to be allowable, therefore, to authorize private roads to be laid out across the lands of unwilling parties by an exercise of this right. The easement in such a case would be the property of him for whom it was established." Cooley Const. Lim. 530.

Bankhead v. Brown, 25 Iowa, 540, held that a law of that State, authorizing the location of private roads and appropriating private property therefor, was unconstitutional. DILLON, C. J., in his opinion in that case, says: "With respect to the act of 1866, we are of opinion that roads thereunder established are essentially private, that is, are the private

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property of the applicant therefor. * * * Such road may be established upon the petition of the applicant alone ; and he must pay the costs and damages occasioned thereby, and perform such other conditions as to fences, etc., as the board may prescribe. The public are not bound to work or keep such roads in repair, and this is a very satisfactory test as to whether a road is public or private." *Sadler v. Langham*, 34 Ala. 311, held the same doctrine. After referring to the statutes, the court, on page 332, says : " Under an irresistible implication, springing out of the language employed in each of these statutes, there was an attempt made to confer authority to take the private property of some person or persons, other than the applicant, as a track for such road. This is a taking of private property. Is the use public ? The statute speaks alone of private roads. They are to be opened and kept in repair at the expense of the applicant, and he alone is to make compensation to the owners of the land over which it passes. Their burdens are to be borne by him, and for their performance he can claim no exemption from work on public roads. We think it clearly appears that these uses are simply private ; and there is nothing in the statute which authorizes public travel on such private roads. So far as the statutes assume to give authority to lay out such road over the lands of another without his consent, the statute is unconstitutional." *Nesbitt v. Trumbo*, 39 Ill. 110, held that an act authorizing the establishment of private roads, so far as it undertook to appropriate private property, was unconstitutional ; that the legislature was powerless to afford the means by which a private way could be established over another's land without his consent. *Dickey v. Tennison*, 27 Mo. 373 ; *Osborn v. Hart*, 24 Wis. 89 ; *Taylor v. Porter*, 4 Hill N. Y. 140, and others, hold the same. The fact that the statute authorizing such ways declares, that they shall be for the exclusive use of the applicant, does not in our opinion change his right. It is to be a private, not a public way, established and maintained at his expense. The public authorities have no control over it. It is as

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much his, as if he secured it by contract instead of by condemnation.

Some of the courts have upheld laws somewhat similar to ours. The reasons given are not uniform. That such ways are branches of the highways and a part of a system, that the power has been exercised and undisputed for a long time, and that the public are interested in securing to every citizen a way to and from his land, are not, in our opinion, sufficient to authorize taking the private property of one and conveying it to another, either with or without compensation.

Concede that the public exigency requires that a way should be opened to every man's farm, and that the State may and should provide for the establishment of a public road or highway, to enable every citizen to discharge his duties, and travel to and from his farm; it does not follow that such ways should be private and owned by the party applying for them. If it would be of public utility to establish the road, then it should be a highway. If not, the right of eminent domain cannot be exercised to establish it. It is not the amount of travel, the extent of the use of a highway by the public, that distinguishes it from a private way or road. It is the *right* to so use or travel upon it, not its exercise.

We refer to the following additional authorities, bearing upon the question: *Clack v. White*, 2 Swan Tenn. 540; *Hickman's Case*, 4 Harring. Del. 580; *Perrine v. Farr*, 2 Zab. 356.

The judgment of the said Posey Common Pleas is reversed, with costs.

The cause is remanded, with instructions to sustain the demurrer to the second paragraph of the answer, and for further proceedings in accordance with this opinion.

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48 462
185 675

THE OHIO AND MISSISSIPPI RAILWAY CO. v. HEMBERGER.

PLEADING.—Where an answer of general denial is pleaded, it is not error for which a cause will be reversed to sustain a demurrer to a paragraph of answer containing only such facts as are admissible in evidence under the general denial.

DAMAGES.—*Defence.*—In an action for an injury to a drain leading from the plaintiff's cellar, the fact that the drain imperfectly accomplished the uses for which it was constructed cannot justify the injury to it; nor may such injury be justified by a license from a third party on whose land the drain is in part constructed.

NEW TRIAL.—*Motion.*—*Demurrer.*—Error in ruling upon a demurrer, or on a motion to strike out part of a pleading, is not in any case a reason for a new trial.

SAME.—*Evidence.*—A motion for a new trial on the ground of erroneously admitting or excluding evidence must indicate the evidence so admitted or excluded.

DAMAGES.—*Notice of Injury.*—It is not necessary that one whose cellar drain has been injured should give notice of the injury to the party that committed the injury before commencing suit to recover damages.

PRACTICE.—*Instruction.*—It is not error to refuse an instruction asked by a party, where the court of its own motion gives an instruction substantially the same as the one asked.

SAME.—It is not error to refuse an instruction which is not applicable to the evidence.

From the Jefferson Circuit Court.

J. D. New, C. E. Walker, and — Roberts, for appellant.

H. W. Harrington and C. A. Korbly, for appellee.

DOWNEY, C. J.—There are three errors assigned in this case: 1. The overruling of the defendant's demurrer to the complaint. 2. Sustaining the demurrer of the plaintiff to the second, third, and fourth paragraphs of the answer; and 3. Refusing a new trial. The suit was commenced in the Jennings Circuit Court, and in consequence of a change of venue, was tried in the Jefferson Circuit Court.

The action was to recover for damages to the drain leading from the cellar under the house of the plaintiff, in consequence of which the cellar was flooded with water, and the contents thereof damaged.

The defendant answered by a general denial. For a sec-

ond paragraph, it alleged that the drain connected with a sewer made by the Jeffersonville, Madison, and Indianapolis Railroad Company, passing from the west side of the last named railroad under said road to the east side thereof, and emptying into a ravine; that the drain from the plaintiff's cellar connected with said sewer under said road, about ten or fifteen feet west of the track thereof; that long before the defendant constructed her branch road, the Jeffersonville, Madison, and Indianapolis Railroad Company had caused said ravine into which said sewer emptied to be filled up with logs, timber, and earth on the east side of its road, for the distance of fifty rods, so obstructing it that the water flowing through said drain from the plaintiff's cellar, and emptying into said railroad company's sewer under its road and into said ravine, could not freely pass through the same, but could only percolate through the same in small quantities, and did not and could not drain the water from the plaintiff's cellar; that the defendant in constructing her branch road, by the leave and license of the said Jeffersonville, Madison, and Indianapolis Railroad Company, entered upon the track and lands of said railroad, and made her branch road at the place plaintiff alleges said drain was cut, in the ground of said railroad company, using care and skill not to sink her road-bed down to the top of plaintiff's drain, and did not do so; and she alleges that all the acts she did, and all the acts alleged to have been done, were done upon the lands and road of said Jeffersonville, Madison, and Indianapolis Railroad Company, and with her consent.

It is alleged in the third paragraph of the answer that there is and was a gutter on the west side of said Jeffersonville, Madison, and Indianapolis Railroad, to carry off the water flowing from the north and west and then southerly; that plaintiff caused the water to flow across Main street east and into said gutter, and also the water from the south side of defendant's road passed therein; and if he sustained any injuries or damage, it was from his own acts in so causing the water to flow from his own premises into said gutter and

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fill the same up and cause the same to percolate through into his drain.

The court, on motion of the plaintiff, ordered the defendant to separate the second paragraph of the answer into two paragraphs, on the ground that it contained two defences to the action. Instead of doing this, however, the defendant appears to have filed a fourth paragraph, in which it is alleged that the defendant made her road in the track of the Jeffersonville, Madison, and Indianapolis Railroad by leave of said last named railroad company, in a careful and skillful manner, and if the plaintiff's drain was cut as alleged, it was on the ground of said last named company, and plaintiff had no right to have his drain in said railroad company's track.

A separate demurrer was filed to the second, third, and fourth paragraphs of the answer, on the ground that they did not state facts sufficient to constitute a defence to the action. These demurrers were all sustained by the court, and the defendant excepted.

A trial by jury ended in a verdict for the plaintiff for three hundred dollars. A motion for a new trial was made by the defendant, which was overruled; it excepted, and there was final judgment for the plaintiff for the amount of the verdict.

There is no specific objection to the complaint pointed out. Indeed counsel for appellant do not, in their brief, insist upon or argue the first assignment of error at all.

We are unable to see in any of the paragraphs of the answer, to which demurrers were sustained, anything material to the controversy, which could not have been given in evidence under the issue formed by the general denial. When this is the case it is not error to sustain a demurrer to special paragraphs. They may be stricken out on motion, as unnecessarily encumbering the record. But a demurrer to them, when sustained, performs in effect the same office. But it is doubtful whether, taking as true all that is alleged in the original second paragraph, it amounted to any bar to

the action. That the plaintiff's drain, from any cause, imperfectly accomplished the uses for which it was constructed, does not seem to be a good excuse to the defendant for injuries to it. Nor can we see how the license from the Jeffersonville, Madison, and Indianapolis Railroad Company could justify the injury. Because the drain was in part upon the track or land of that company, the defendant could not claim the right to injure or destroy it, to the damage of the plaintiff. It is not shown that the drain, so far as it was on the track or lands of that company, was not there by the consent of that company, or by a right obtained from it. The fourth paragraph, which was filed under the order of the court to separate the second paragraph into two paragraphs, very clearly contains no defence to the action. If, as alleged in the third paragraph of the answer, the plaintiff himself caused the overflow of his cellar, and the consequent damage, this could well have been shown under the general denial. Without proof by the plaintiff that the injuries and damage resulted from the act of the defendant, the plaintiff could not recover. Evidence that the plaintiff himself caused the injury would have shown that it was not done by the defendant, and this evidence was admissible under the general denial.

We are next to consider the questions which are presented under the assignment relating to the overruling of the motion for a new trial. Referring to the written motion, we find that the reasons for a new trial are stated as follows: "First. The court erred in sustaining plaintiff's demurrer to defendant's answer. Second. The court erred in refusing to strike out parts of complaint on motion of defendant. Third. The court erred in admitting evidence offered by plaintiff over the objection of defendant. Fourth. The court erred in excluding evidence offered by defendant. Fifth. The court erred in giving to the jury the charges asked by plaintiff. Seventh. The court erred in refusing to charge the jury as asked by defendant, in charges from one

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to twenty inclusive. Eighth. The finding of the jury is contrary to the evidence, is not sustained by the evidence, and is contrary to the law and evidence. Ninth. The damages are excessive."

The first and second reasons given for a new trial are not, in any case, reasons for a new trial. *Milliken v. Ham*, 36 Ind. 166. The third and fourth reasons are too general to present any question to the circuit court, or for our decision. We can not know what evidence is supposed to have been improperly admitted or excluded. *Vankeuren v. Howard*, 39 Ind. 291; *Cass v. Krimbill*, 39 Ind. 357; *Call v. Byram*, 39 Ind. 499; *Dorsch v. Rosenthall*, 39 Ind. 209. There does not appear in the record any ground for the fifth reason for a new trial. The bill of exceptions shows the giving of eight charges, which are headed "court charges," and that a series of charges, some of which are numbered, and some without numbers, was asked by the defendant and refused by the court. It is not shown that any charges were asked by the plaintiff or given at his instance. The seventh reason for a new trial is the refusal to give charges asked by the defendant, from one to twenty. As the bill of exceptions shows, the first charge asked by the defendant was without any number. There are in the record charges numbered one, two, three, five, six, seven, eight, nine, ten, eleven, twelve, and thirteen. We need not examine these charges *seriatim*. Counsel for appellant in their brief say, the court should have given charges one, two, and thirteen, to the effect that if the plaintiff knew that the defendant had cut his drain, he should have given notice to the defendant to remedy it, or should have protected himself from danger in consequence of it, if he could do so with the use of ordinary care on his part. No authority is shown which would require the plaintiff to give notice to the railroad company that it had done the injury complained of in order to entitle him to recover. As to the diligence required of the plaintiff to protect himself from damage resulting from the wrongful act of the defendant, the court stated to the jury as follows: "The law gave plaintiff a

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reasonable time to repair the injury; and for the loss of the use of the cellar for this reasonable time, he would be entitled to recover; but if he failed to repair within a reasonable time, then he could not recover on account of the loss of the use of the cellar after that time had elapsed, though still and afterward unfit for use. If you find that he built the new drain within a reasonable time, or so soon thereafter as it could conveniently be done, taking into consideration the condition of the weather and other surrounding circumstances, and you find it could not sooner, by reasonable effort, have been made fit for use, then he will be entitled to recover for the value of the use of the same from the time it was overflowed until the new drain was put in." In view of the charge given, we think there was no error in refusing to give those which were asked on this subject and refused.

The plaintiff held the property to which the injury was done, by lease. His lease was dated the 1st of August, 1869, and was for one year with the privilege of two years. The principal injuries from the flowing of the water into the cellar seem to have occurred in November and December, 1869. The new drain was made, or completed by the plaintiff on the 16th of August, 1870, as appears from the evidence. In the third, eighth, and twelfth instructions asked by the defendant, the court was requested in substance to say to the jury, that under such a state of facts the plaintiff could not recover for making the new drain, for the reason that the plaintiff's lessor in fact made it, and he alone could recover for its construction. We have not been able to find any evidence in the bill of exceptions showing that the lessor of the plaintiff constructed the new drain or paid for its construction, and, therefore, can not see the propriety of giving any such instructions to the jury as those asked upon this point. It is not claimed by counsel for appellant in their brief that any other of the instructions refused should have been given by the court. With reference to the sufficiency of the evidence to justify the verdict, it is enough to state that the evidence is not of a character, taken as a

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whole, to justify us in reversing the judgment on that ground. It has been the language of this court, as it must be of every similar appellate court, reaching as far back as the case of *Rapp v. Grayson*, 2 Blackf. 130, at least, that "if the evidence, relative to the merits of the action, be contradictory, and the jury have any grounds for their verdict in favor of the plaintiff, a court of errors will not reverse a judgment on the verdict, because a new trial had been refused. *Aliter*, if there was no evidence of a fact essential to the support of the action." See, also, *The Madison and Indianapolis R. R. Co. v. Taffe*, 37 Ind. 361, where many cases on this subject are collected. There is little conflict in the evidence in this case. It seems to us to justify and sustain the verdict of the jury.

The judgment is affirmed, with five per cent. damages and costs.

ASTON v. WALLACE, ADMINISTRATOR.

PRACTICE.—Appearance.—Default.—Trial.—Where a defendant appears and files an answer of set-off, he may take a rule upon the plaintiff to reply, and on failure to reply, judgment may be taken for the defendant for want of a reply; but if the defendant abandons his defence, and does not appear at the trial until he is defaulted, he waives his right in this respect, and the trial may proceed as if the matters alleged in the answer had been denied.

EVIDENCE.—A deputy clerk, having the papers in a cause, may testify as to who was engaged as an attorney in the cause, and the length of time it was on the docket, where it does not appear that he relies on the papers to enable him to so testify.

From the Marion Common Pleas.

J. W. Gordon and T. M. Browne, for appellant.

OSBORN, J.—The appellee, as administrator of the estate of Robert L. Walpole, sued the appellant, to recover for

Aston v. Wallace, Adm'r.

professional services rendered by Walpole to the appellant. The appellant appeared and filed an answer of two paragraphs. 1. The general denial. 2. Set-off. No reply was filed.

When the cause was called for trial, the appellant, failing to appear, was defaulted, and the cause was tried by the court, who found for the appellee, and over a motion for a new trial judgment was rendered on the finding.

The causes for a new trial as stated in the motion are: 1. There was a trial without any issue upon the second paragraph of the answer. 2. Error of the court in admitting Dan. Greenfield's evidence in relation to the services of Walpole. 3. The finding is contrary to law and the evidence. 4. Excessive damages. 5. One claim was allowed twice. 6. Error in admitting the evidence of Kimball.

The error assigned is in overruling the motion for a new trial.

The appellant might have taken a rule upon the appellee to reply to his answer, and on failure to reply under the rule judgment might have been taken for want of a reply. He did not do that. On the contrary, after filing his answer, he abandoned his defence and did not appear at the trial until he had been defaulted. He waived his rights by failing to assert them in a proper manner and at the proper time. The trial was properly had as if the matters alleged in the answer had been denied. *Train v. Gridley*, 36 Ind. 241, and authorities there cited. BUSKIRK, J., discusses the practice in that case and gives the decisions on this question. It is unnecessary to repeat them.

The services claimed to have been rendered were as an attorney. Greenfield was one of the deputy clerks of a court in which an action against the appellant had been pending. He was permitted to testify that he had examined the records of the court and had the papers in the case mentioned, that Walpole was the attorney for the appellant, and that the cause was on the docket for eleven terms. The

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objection was on the ground that the evidence was not the best to prove the facts. It does not appear from the evidence that the witness relied upon the papers to enable him to state that Walpole was 'appellant's attorney. He had the papers in the cause, it is true, but his statement was, that Walpole was the attorney for the appellant. Kimball was an attorney and testified that the value of the services of Walpole in one case were fifty dollars, and twenty-five dollars in another. No objection was made to his testifying or to any of his evidence.

We have examined the evidence and cannot say that it does not sustain the finding of the court.

The services proved amounted to two hundred and forty-one dollars and twenty-five cents. He had given the appellant credit for thirty-five dollars, and one of the appellee's witnesses proved forty dollars of the set-off pleaded, making seventy-five dollars to be deducted. The judgment was for one hundred and sixty-six dollars and twenty-five cents. The damages were not excessive.

The judgment of the said Marion Common Pleas is affirmed, with costs and five per cent. damages.

WITZ v. HAYNES.

JURISDICTION.—*Forcible Entry and Detainer.*—The statute confers jurisdiction, in cases of forcible entry and detainer, upon justices of the peace and also upon courts of common pleas.

SAME.—*Court of Common Pleas.*—In the court of common pleas, where it did not appear upon the face of the complaint, or by a subsequent pleading verified as the statute required, that the title to real estate was in issue, the jurisdiction of the court was not ousted.

From the White Common Pleas.

A. W. Reynolds, J. H. Matlock, J. B. Davis, and S. A. Huff, for appellant.

WORDEN, J.—Complaint by Haynes against Witz for forcible detainer. It is alleged in the complaint, in substance, that the plaintiff is the owner by leasehold of certain described lots in the town of Monticello, in said county, and entitled to the possession thereof; that "on or about the 15th day of November, 1870, the defendant entered upon and took possession of said real estate, and with menaces, threats, force, and arms, unlawfully detained the possession thereof, and still unlawfully and forcibly detains the possession of said real estate from the plaintiff; wherefore," etc.

Answer of general denial, trial by jury, verdict and judgment for the plaintiff, over a motion in arrest made by the defendant.

The only question made here relates to the jurisdiction of the court below. The counsel for the appellant claim that as the title to real estate was put in issue by the answer of general denial, the court of common pleas had no jurisdiction of the cause.

The statute confers jurisdiction in such cases upon justices of the peace. 2 G. & H. 632, sec. 12. Also upon the court of common pleas. *Id.* 630, note: "Where the question of title to real estate is incidentally put in issue in a case in which jurisdiction is expressly conferred on the court of common pleas, its jurisdiction is not thereby ousted." *Bourgette v. Hubinger*, 30 Ind. 296.

But, assuming that this view may not be conclusive of the matter, we proceed to inquire whether the question was raised below in such a manner as to oust the court of jurisdiction.

The evidence is not in the record, and if title to real estate is put in issue at all, it is by the answer to the complaint. But, as we have seen, the statute confers jurisdiction upon the court of common pleas in this class of actions, and it would be quite illogical to say that a denial of the cause of action takes away the jurisdiction of the court to hear and determine the very matter which the statute authorizes it to try. But, conceding that the answer might put in issue the

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title to real estate, it was not verified by affidavit, as was required, in order to oust the jurisdiction of the court below. The amended 11th section of the common pleas act, 2 G. & H. 22, provides, that "when it appears upon the face of the complaint or by other legitimate pleadings verified by affidavit, that the title to real estate is in issue in the common pleas court of any county, the cause, with the papers, and a transcript of the entries of record shall be transferred to the circuit court of the same county, and there stand for trial," etc.

Here it did not appear on the face of the complaint that the title to real estate was in issue, nor was there any subsequent pleading, verified as the statute requires, filed in the cause. The jurisdiction of the court below was not ousted. *Bourgette v. Hubinger, supra.*

The judgment below is affirmed, with costs.

BARGER ET AL. v. MANNING.

SUPREME COURT.—*Notice to Co-Parties.*—Where a part only of the defendants in a judgment appeal therefrom to the Supreme Court, without notice to the other defendants in accordance with section 551 of the code, the appeal will be dismissed.

From the Jay Common Pleas.

A. B. Jetmore, J. W. Gordon, T. M. Browne, and R. N. Lamb, for appellants.

J. W. Headington and I. Allmon, for appellee.

WORDEN, J.—This was an action by the appellee against the appellants and William W. Goodrich, upon promissory notes. There was judgment in favor of the plaintiff against all the defendants, Goodrich having made default, and a verdict having been obtained against the other two defendants,

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who appeal, and in whose names only, as appellants, errors have been assigned. In accordance with numerous decisions of this court, the appeal must be dismissed for failure to comply with sec. 551, p. 270, 2 G. & H.

The appeal is dismissed, with costs.

WHITEHURST v. THE STATE.

CRIMINAL LAW.—*Conviction after Repeal of Law.*—The act of February 27th, 1873 (Acts 1873, p. 151), to regulate the sale of intoxicating liquors, contains no provision saving prosecutions pending at the time of its passage, and as it repealed all laws in conflict with any of its provisions, a judgment rendered in such an action for a violation of the previous law is without foundation, even if rendered on a plea of guilty.

From the Allen Criminal Circuit Court.

L. Newberger and *J. A. Holman*, for appellant.

J. C. Denny, Attorney General, for the State.

OSBORN, J.—On the 8th day of February, 1873, the grand jury returned into open court an indictment against the appellant, for retailing intoxicating liquor without license. On the 27th of the same month, an act to regulate the sale of intoxicating liquors, etc., was approved. Acts 1873, p. 151. On the 12th day of March following, the defendant appeared in open court and pleaded guilty, and a fine of ten dollars was assessed against him, and a judgment rendered thereon in the usual form. On the 14th day of the same month, and at the same term of the court, the appellant moved the court to set aside the judgment. His motion was overruled, and he excepted.

The errors assigned are:

- 1st. In overruling the motion to set aside the judgment.
- 2d. In rendering the judgment against him.

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The act of February 27th, 1873, repealed all laws in conflict with any of its provisions. Sec. 20, p. 157, Acts 1873. The act in force when the offence was committed, and under which the indictment was found, had therefore been repealed before the conviction of the appellant.

In *Taylor v. The State*, 7 Blackf. 93, it is said: "No principle is better settled than that a conviction can not take place after the repeal of a violated law, unless the repealing act contain a provision for that purpose." *Sprigs v. The State*, 2 Ind. 75; *The State v. Loyd*, 2 Ind. 659.

The act of 1873 contains no provision saving prosecutions then pending. The result is, that the judgment was rendered without any law for it to rest upon. In such a case and under such circumstances, it can make no difference that the judgment was rendered on a plea of guilty.

The judgment of the said Allen Criminal Circuit Court is reversed. The cause is remanded, with instructions to said court to set aside said judgment and permit the appellant to withdraw his plea of guilty, and discharge him from further prosecution or custody on said indictment.

BROWN ET AL. V. BROWN.

WILL.—Construction of.—Partition.—A testator, having four children, all minors, by his will provided that the widow should have the management of his real estate until the oldest son should arrive at twenty-one years of age, and use the proceeds for the support of the family and to keep the property in order, and provided that the surplus might be put at interest for the use of the widow and children; and when the oldest son should arrive at the age of twenty-one years, his share of the real estate should be set off to him; and that the other heirs, as they should respectively become of full age, should have their respective shares set off to them. After becoming of age, and while the other children were minors, the oldest son brought an action for partition, making the will a part of his complaint, and asked for entire par-

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tition among all the heirs; and the widow for herself, and as guardian of the minor heirs, answered, asking that full partition be made.

Held, that the widow was entitled to have one-third of the real estate set off to her, and the oldest son one-fourth of the residue set off to him, and that the minor heirs were not entitled to have partition.

PRACTICE.—Exception to Finding.—Where there is no special finding by the court according to section 341 of the code (2 G. & H. 207), a mere exception to the finding of the court, noted by the clerk, does not put a question upon the record to be reviewed by the Supreme Court.

From the Floyd Circuit Court.

M. C. Kerr and *W. J. Hisey*, for appellants.

D. W. LaFollette, for appellee.

DOWNEY, C. J.—The appellee filed his petition for the partition of certain real estate against John H. Brown, James A. Brown, Charles Brown, and Catharine Brown, guardian, etc. It is alleged that John Brown, now deceased, was the owner in fee simple of the real estate; that he was the father of the petitioner and of all the defendants, except said Catharine, who was his widow and is their duly appointed guardian, and that she is now the wife of one Hiram Hopper. It is further stated that said John Brown died testate, in 1858, and devised his estate, real and personal, to his said widow and children as set forth in his will, a copy of which is filed with the complaint; that the petitioner is now of the age of twenty-one years; that John H. Brown is of the age of nineteen years, James A. is of the age of seventeen years, and Charles is of the age of fifteen years; that it will promote the interest of all the co-owners to have full, complete, and final partition of said real estate now made amongst the persons entitled thereto, to wit: One-third part thereof in value to said Catharine Hopper, one-fourth of the remaining two-thirds thereof in value to each of the other parties hereto. Partition accordingly is asked. Two clauses of the will are brought in question; the second, which is as follows: "I will that my wife, Katharine Brown, shall have the management of my real estate until my son William Brown arrives at twenty-one years of age, and that she may

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use the proceeds of the farm whereon we now reside, or so much thereof as may be necessary for the support of the family and to keep the property in order; the overplus, if any, may be put out at interest for the benefit of my wife and children;" and the seventh, which reads as follows: "When my son William Brown shall arrive at twenty-one years of age, that he shall be entitled to have his share of my personal estate set apart to him, together with his part of the real estate; also, that the other heirs, as they arrive at twenty-one years of age, to have theirs respectively set apart to them."

Catharine Hopper, for herself and as guardian of the other defendants, answered, admitting the facts as stated in the petition and uniting in the request for full and final partition.

The court upon the hearing found that Catharine Hopper was the owner in fee simple of an undivided third part of the real estate; that William Brown, having attained to the age of twenty-one years, is entitled to one-fourth of the remaining two-thirds of said real estate in fee simple; and that the defendants John H. Brown, James A. Brown, and Charles Brown, had not yet attained to the age of twenty-one years respectively, and were not therefore yet entitled, under said will, to any of the said real estate. The court further found that said Catharine and William were entitled to have partition, so that their shares should be set off to them respectively, and that the said John H., James A., and Charles were not entitled to partition. To this they excepted. A motion for a new trial was made by said last named defendants, which was overruled, to which they again excepted. From that part of the judgment of the court denying them partition, the said John H., James A., and Charles Brown appealed to this court.

The errors assigned are the following: 1. That the circuit court improperly refused partition to said appellants. 2. That the finding of the court was not sustained by sufficient evidence. 3. That the finding was contrary to law. 4. The refusal to grant a new trial.

There is no special finding by the court according to section 341 of the code, 2 G. & H. 207. So that a mere exception to the finding could not put a question upon the record to be brought to this court. The finding is not made at the request of a party, is not signed by the judge, nor is it set out in any bill of exceptions. The mere exception to the finding of the court noted by the clerk does not, under the first assignment of error, present any question. The other assignments are all embodied under the fourth, the refusal to grant a new trial. The grounds of the motion were, that the finding of the court was not sustained by the evidence and was contrary to law. The question is, whether the court upon the pleadings, for it does not appear that any evidence was offered, should have awarded partition in favor of the infant devisees, as well as in favor of the widow and the adult son. If we were to take the second clause of the will alone into consideration, it would seem to be the intention of the testator that the real estate should remain undivided and subject to the control of his widow, with the right in her to use the proceeds for the support of the family, etc., only until William should arrive at the age of twenty-one years. But taking this clause in connection with the seventh, it seems pretty evident that the intention was, that only William's share should then be set off, and the other shares as the owners thereof arrived at the age of majority. In the seventh clause it is said, when William shall arrive at twenty-one years of age he shall be entitled to have his share of the personal estate set apart to him, together with his part of the real estate; also, that the other heirs, as they arrive at twenty-one years of age, are to have theirs respectively set apart to them. This language seems almost too plain to admit of any doubt. Assuming, then, that the question must be governed by the construction to be put upon the will, we must hold that the ruling of the circuit court was correct. It is expressly provided by statute, that the court shall not order or affirm partition of any real estate contrary to the

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intention of a testator expressed in his will. 2 G. & H. 363, sec. 10.

The judgment is affirmed, with costs.

43	478
141	145
43	478
146	254

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CONTRACT.—Consideration.—Promissory Note.—The makers of a promissory note mortgaged their personal property to a third person to secure to such person a debt due from the mortgagors, and the mortgagee was placed in possession of the mortgaged property, and was selling the same, to make the amount due, under a power of sale contained in the mortgage, and while so engaged he agreed with the holder of the note made by the mortgagors that if he could save enough out of the mortgaged goods to pay his own debt and the amount of the note, he would pay the note, and as evidence of the agreement he placed his name on the note.

Held, that if he failed to realize enough from the sale of the goods to satisfy his own debt, he could not be held liable on the note, there being no consideration to support the execution of the note.

SAME.—To constitute a valid consideration, there must be some benefit to the promisor, or to a third person, or some loss or inconvenience to the promisee.

SAME.—A mere naked promise to pay the already existing debt of another, though in writing, if without a new consideration, is void.

From the Putnam Circuit Court.

Smiley & Neff, for appellant.

D. E. Williamson and *A. Daggy*, for appellees.

OSBORN, J.—This was an action by the appellees against the appellant, Robert Lienberger, and Wallace W. Rogers. The complaint alleges that the defendants on the—— day of December, 1869, executed to the plaintiffs their note for the sum of two hundred and fifty-five dollars and sixty-four cents, payable one day after its date, and that it is unpaid. The action was commenced on the 5th day of March, 1872. Process was returned not found, and the cause was continued as to Lienberger and Rogers. Starr, the appellant, appeared and filed an answer.

The answer alleges that he signed the note under the following circumstances: That the note had been placed in the hands of attorneys for collection; that it had been signed and delivered by his co-defendants to, and accepted by, the plaintiffs more than one year before he signed his name to it; that his co-defendants were indebted to him in the sum of twenty-five hundred dollars, secured by a valid chattel mortgage, executed by them to him upon a stock of goods, which was duly recorded; that he was in possession of the goods, and engaged in selling them, under a power of sale in the mortgage, to make the money due from them to him. Whilst so engaged in disposing of the goods, one of the attorneys of the plaintiffs called upon him and enquired if he could save enough out of the goods, after paying himself and the expense of the sale, to pay the plaintiff's claim; he answered that he thought he could; that if he could, he would apply it in payment of the plaintiff's note. Some time afterward, and before the goods were all sold, the same attorney called upon him again and proposed that he should sign his name to the note, as the plaintiffs were a little restless, and that would show to them that he would carry out his promise to apply the overplus upon the note in good faith; that he did then and there write his name under the names of his co-defendants, and for no other or different consideration whatever. He further alleges that, after disposing of all the goods mortgaged, he did not receive enough to pay his claim by six hundred dollars; that his co-defendants were both wholly insolvent at the time he signed the note and have been ever since.

A demurrer was filed to that answer, on the ground that it did not state facts sufficient to constitute a defence. The demurrer was sustained, to which an exception was taken. The appellant refused to amend, and final judgment was rendered against him for the amount of the note.

The demurrer ought to have been overruled. The facts alleged in the answer were a bar to the action.

A valid consideration for a promise is of the very essence

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of a contract, and must exist although the contract be reduced to writing; otherwise the promise is void. Chitty Contracts, 26-7. It need not be of benefit to the party making the promise. It must be of some benefit to himself or to a third person, or some injury, loss, or inconvenience to the promisee. *Id.* 29. A mere naked promise to pay the already existing debt of another without a new consideration is void. *Leonard v. Vredenburg*, 8 Johns. 29; Chitty Con. 52; Story Con. 356, sec. 433.

The facts stated in the answer show that there was no consideration for the execution of the note by the appellant. The note had been made and accepted by the payees. The appellant had not been in any way connected with it. There was to be no forbearance nor any loss or inconvenience to the payees, in consideration of signing the note. The sole and only consideration for it was to show to the payees that he intended to act in good faith and apply the overplus on the sale of the mortgaged goods to the payment of the note.

We need not decide, in this case, how far he had authority to sell more of the goods than was sufficient to pay his own debt, or to appropriate the overplus, as his debt was not all paid by the sale of the goods.

The judgment of the said Putnam Circuit Court is reversed, with costs. The cause is remanded, with instructions to overrule the demurrer to the answer, and for further proceedings in accordance with this opinion.

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CITY.—*Contract, How Made or Annulled.—Common Council.*—The common council of a city can only contract by an order, resolution, or ordinance,

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passed in the manner required by statute; and when thus made, it can be repealed or annulled only by a vote of the council.

SAME.—Pleading.—A complaint upon a cause of action based upon the making and annulling of a contract by a city must contain a copy of the orders of the common council in making and annulling the contract.

From the Vigo Circuit Court.

W. W. Rumsey, for appellant.

W. E. McLean, A. J. Kelly, and G. W. Kleiser, for appellee.

BUSKIRK, J.—The sufficiency of the complaint is the only question presented by the record for our decision.

Omitting the formal parts, the complaint is as follows:

“The plaintiff complains of the defendant and says that on or about the 4th day of June, 1872, the plaintiff presented a petition to the common council of the city of Terre Haute, praying that the contract for the removal of dead animals from said city be awarded to plaintiff; that the said council, at its regular session held on the — day of June, 1872, granted said petition, awarding said contract to plaintiff for the term of five years; plaintiff to remove said dead animals free of charge to said defendant, within twelve hours after receiving notice of the same; plaintiff to leave books in different parts of the city, that orders might be left for the removal of said dead animals; a copy of said petition is filed herewith and made a part hereof; that plaintiff was to enter upon the performance of said contract on the 10th day of June, 1872, but by the special request of the defendant did not commence the said performance until the 1st day of July, 1872; that plaintiff was put to great expense in making preparations for the performance of said contract; that he entered upon and commenced the performance of said contract on the 1st day of July, 1872, and did and performed his part of the contract according to the terms thereof, and was and has been ready and willing to continue the performance and fulfilment of the same; that on the — day of July, 1872, the defendant wrongfully and without cause revoked the order granting said petition and thereby hindered, prevented, and

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discharged the plaintiff from continuing the performance of said contract, whereby plaintiff has been deprived of great gains and profits, which he might otherwise, and would have derived from the continuance of the work under the said contract; wherefore plaintiff says he has been damaged to the amount of five thousand dollars, and asks judgment for five thousand dollars and other proper relief.

A copy of the petition was filed with the complaint, but no useful purpose would be accomplished by setting it out.

A demurrer was overruled to the complaint, and the appellant excepted.

There was issue, trial by jury, and a finding for the appellee in the sum of fifty dollars. A motion for a new trial was overruled, and judgment was rendered on the verdict.

The error assigned is the overruling of the demurrer to the complaint.

Several objections are urged to the complaint. The first and most important objection is, that the action is based upon the orders of the common council, granting to the appellee the contract to remove the dead animals named in the complaint, and the one revoking and annulling such contract, and that such orders or a copy thereof should have been filed with and made a part of the complaint.

The appellee, by his action, sought to recover from the appellant damages, which he alleged he had sustained by the wrongful act of the common council in repealing a previous order and annulling a contract. The common council can only contract by an order, resolution, or ordinance passed in the manner required by the statute; and where a contract has thus been made, it must be repealed or annulled by a vote of the common council. It is very manifest to us that the cause of action was based upon such orders; and it is a well settled rule of pleading, that where a contract must be in writing, the party setting up such contract must file with the complaint the original or a copy of such contract. The case of *Lytle v. Lytle*, 37 Ind. 281, is in express terms limited in its application to actions founded upon judgments, and

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should not be extended by implication to other actions. If these orders had been filed with, and made a part of, the complaint, the court below and this court could have determined whether there had been a contract and wrongful violation thereof. We think the complaint was bad, because copies of such orders were not filed with and made a part thereof.

Other questions are argued by counsel, but it will be time enough to decide them when the complaint is so amended that the court below and this court can determine, first, whether there was a contract, and, second, whether there was a wrongful violation of such contract.

The judgment is reversed, with costs; and the cause is remanded to the court below, with directions to sustain the demurrer to the complaint, and for further proceedings in accordance with this opinion.

KLARE ET AL. v. THE STATE.

LIQUOR LAW.—*Intoxicating Liquor.*—The Act of Feb. 27th, 1873, relating to the sale of intoxicating liquors (Acts 1873, p. 151) has no provision defining what the words “intoxicating liquor” apply to.

SAME.—*Beer.*—*Evidence.*—The mere naked opinion of a witness that common brewer's beer is intoxicating, founded upon no knowledge of its effects, or of what it is composed, or how it is made, is not sufficient to show that it is intoxicating.

SAME.—*Judicial Notice.*—A court will not take judicial notice that common brewer's beer is intoxicating; and before a party who has sold such beer can be convicted of selling intoxicating liquor, it must be proved that the beer sold was intoxicating.

From the Marion Criminal Circuit Court.

N. B. Taylor, F. Rand, and E. Taylor, for appellants.

R. P. Parker, H. Lee, J. B. Elam, and J. C. Denny, Attorney General, for the State.

OSBORN, J.—The defendants were jointly indicted, tried,

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and convicted for selling intoxicating liquor to Julius Cook, a minor, and over a motion for a new trial, judgment was rendered against them for twenty dollars and costs.

The only question presented for our consideration is on the sufficiency of the evidence to sustain the verdict.

Julius Cook testified as follows: "My name is Julius Cook; I was nineteen years of age in May last; I know the defendants; Frederick Klare is a bar-tender. The defendant Augustus Schrader is a bar-tender also, both at 588 South Meridian street, in the city of Indianapolis, Marion county, Indiana. I know my age, because I recollect when I was born. The latter part of July last I got a glass of beer at the saloon, No. 588, above mentioned. I can't say positively whether I purchased it or whether it was given to me. I don't know what kind of beer it was; think it was common brewer's beer; can't say if it was intoxicating or not; did not intoxicate me, but think brewer's beer is intoxicating. The defendant Klare was not there. I did not get it of him; think it was the defendant Schrader I got it of; think I gave five cents for it. No one was with me, and I don't recollect of any one being in the saloon at the time except myself and the person I think I got the beer of. I think I put five cents on the counter; don't know if it was taken up by any one; have been in the saloon several times and bought cigars and soda water." On that evidence the State rested.

The defendant Klare testified as follows: "I know the prosecuting witness Julius Cook. Have been acquainted with him four or five months; never sold him any intoxicating liquor of any kind; don't recollect of ever seeing him in the saloon."

The defendant Schrader testified as follows: "I have kept bar at the saloon 588 for four or five months past. Have been acquainted with the prosecuting witness Julius Cook for about ten months. Have no recollection of said witness being in said saloon to buy soda water or cigars, since I have been there. He may have been in the saloon since I have kept bar there, but not when I was in. I am not there

all the time. I never sold or gave the prosecuting witness any intoxicating liquor of any kind since I have been bartender at said saloon. I am sure of that. Prior to going into said saloon as bar-tender I was not in the business of selling liquor."

The appellants filed separate motions for a new trial. There was no evidence against Klare. The prosecuting witness, Cook, and Klare testify that he was not there. He had no connection whatever with the sale.

As to the defendant Schrader, we think there was evidence before the jury from which they might find that he sold to Cook a glass of beer, and that Cook was a minor at the time. But we do not think that the proof is sufficient to show that the beer sold was intoxicating. It is true, the witness swore that he thought he bought brewer's beer, and also that he thought that it was intoxicating. It was simply his opinion, nothing more. He did not state that he had any knowledge of its effects, or of the ingredients of which it was made. There is nothing in evidence showing that he had any knowledge by experience, or otherwise, of the effects of such beer, except from that bought of Schrader. The court does not take judicial notice that common brewer's beer is intoxicating. That is a fact to be proved before conviction can be rightly had for selling intoxicating liquor. It has been held that we take judicial notice that distilled spirits are intoxicating. *Carmon v. The State*, 18 Ind. 450; *Commonwealth v. Peckham*, 2 Gray, 514. In *Jackson v. The State*, 19 Ind. 312, it was held that where an indictment, under the act of March 5th, 1859, charged the sale of wine, the court did not judicially know that it was not intoxicating. The averment in the indictment in that case was, that the defendant retailed "a quantity of intoxicating liquor less than a quart, to wit, one gill of wine." That act declared that the words "intoxicating liquors" as used in the act should apply to any spirituous, vinous, or malt liquor, and it was urged by the defendant in the case last cited, that wine was not intoxicating, and that it was not in the power of the

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legislature so to declare it. The court declined to pass upon the question, and held that it did not know judicially that it was not intoxicating, and reversed the case, because it was not shown that the liquor was sold in this State. In *The State v. Moore*, 5 Blackf. 118, it was held that fermented was not spirituous liquor. "Spirit is the name of an inflammable liquor produced by distillation."

The act of February 27th, 1873, Acts 1873, p. 151, under which the indictment in the case at bar is founded, has no provision defining what the words "intoxicating liquor" apply to. That clause of the act of March 5th, 1859, is omitted. We do not undertake to declare what evidence is necessary to establish the fact that the liquor sold was intoxicating. We do hold, however, that the mere naked opinion of a witness, that the liquor sold is intoxicating, founded upon no knowledge of its effects, or of what it is composed, or how it is made, is not sufficient; that we do not take judicial notice of the fact that the kind of beer sold is intoxicating, and that it must be proved before a conviction can be had for selling it.

The judgment of the said Marion Criminal Circuit Court is in all things reversed. The cause is remanded to said court, with instructions to grant a new trial, and for further proceedings in accordance with this opinion.

WILSON ET AL. v. ROOT ET AL.

PRACTICE.—Supreme Court.—New Trial.—The Supreme Court has no power to grant a new trial; when a motion for a new trial has been made and has been ruled upon by an inferior court, its ruling may be reviewed in the Supreme Court, when the grounds upon which the court acted are properly shown by the record, and when it is assigned for error that the court improperly overruled or granted the motion.

SAME.—Assignment of Error.—Matters which are reasons for a new trial in the court below should not be assigned as error in the Supreme Court.

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SAME.—It is not error for which a judgment will be reversed, that a demurrer has been sustained to paragraphs of an answer, when the general denial was pleaded, and the special matters alleged in answer might be proved under the general denial.

DAMAGES.—*Undertaking in Attachment.*—In an action on an undertaking in attachment, where both the action and the attachment proceeding have been defeated, the reasonable attorney's fees of the defendant in the action in which the attachment is sued out, for defending both the action and the attachment, may be included in the damages.

SAME.—There can be no discrimination in such case between attorney's fees for services rendered before and after a change of venue from the county granted on the application of the defendant.

From the Wayne Circuit Court.

W. A. Peelle, H. C. Fox, and W. S. Ballenger, for appellants.

J. P. Siddall and C. H. Burchenal, for appellees.

DOWNEY, C. J.—Wilson and Lowry sued the appellees in the Wayne Common Pleas, and in connection with their action, and as authorized by the code, they took out an attachment against the property of the appellees, and for that purpose executed an undertaking with security, in which they undertook that they would duly prosecute their proceeding in attachment in the action, and pay to the defendants all damages which they might sustain if their proceedings should be wrongful and oppressive. The attachment went into the hands of the sheriff, and by virtue of it he seized six thousand dollars of bank stock owned by the attachment defendants. A change of venue was granted in the action from the Wayne to the Union Common Pleas, at the instance of the appellees, where, after issues were found, there was a trial and final judgment for the appellees, not only as to the attachment, but also as to the existence of any cause of action against them.

This was an action by the appellees against the appellants on the undertaking which was executed and filed in that case by the appellants. In the complaint the plaintiffs allege the commencement of the action by the appellants, Wilson and Lowry, against them, on the 16th day of July, 1866, to

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recover the sum of four thousand one hundred and ten dollars, which they alleged was due to them from the plaintiff herein, the execution of the said undertaking, which is made part of the complaint, and a copy thereof filed, the issuing of the order of attachment by the clerk against the property of the plaintiffs, the delivery of the same to the sheriff, the seizure of said bank stock by him; that the attachment continued in force from the 16th day of July, 1866, until the 6th day of December, 1867, on which last named day, it is alleged, said cause was tried in the said Union Common Pleas, and a judgment thereon rendered in favor of the plaintiffs in this action and against the defendants herein. It is then alleged that the said proceedings of the said Wilson and Lowry were wrongful and oppressive, in this, to wit: that plaintiffs did not owe and were not indebted to them in the said sum of four thousand one hundred and ten dollars, or in any sum whatever, and the said suit was wrongfully and vexatiously commenced and prosecuted, for the purpose of harassing the plaintiffs and extorting money from them; that at the time of the commencement of said suit, the plaintiffs resided in the city of Cincinnati, Ohio, where their business was carried on, and where they had property subject to execution more than sufficient to satisfy the amount claimed by said Wilson and Lowry in said suit; and by the seizure and attachment of said property the plaintiffs were compelled to incur great expense in travelling to the county where the suit was pending, and employing attorneys to defend said suit, and they lost a great deal of time in so doing, while they were compelled to neglect their legitimate business; and they were also compelled to bring their books and papers from their office in Cincinnati into court, whereby great inconvenience and damage were occasioned to their business, and also to bring their book-keeper as a witness upon the trial, he being a material witness for them, and the matter involved in said suit being of such a nature that his deposition could not be taken so as to answer the purpose; and plaintiffs were also compelled to pay out large sums of

money for the taking of depositions to be used in the said cause, and they were also deprived of the use of said property during the continuance of said attachment and were prevented from disposing of the same, whereby they sustained great damage; and plaintiffs say that by reason of the commencement and prosecution of said attachment proceedings against them in manner aforesaid, they sustained damage, as aforesaid, in the sum of one thousand dollars, which damage remains due and wholly unpaid, for which sum they demand judgment. The defendants demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. This demurrer was overruled, and the defendants excepted.

The defendants then answered in five paragraphs: 1st. A general denial. 2d. That all the damages sustained by the plaintiffs grew out of the action brought by Wilson and Lowry against them and their defence of the same, and not out of the attachment or the defence of the same. 3d. That the plaintiffs did not pay out any money whatever or incur any loss by reason of the issuing of said attachment. 4th. That the attachment was properly and legally issued against the property of the defendants, they being at the time and still being residents of the State of Ohio. 5th. This paragraph was by Wilson only, alleging his discharge in bankruptcy.

The plaintiffs demurred separately to the second, third, fourth, and fifth paragraphs of the answer, on the ground that neither of them stated facts sufficient to constitute a defence to the action. The court sustained the demurrer to the second, third, and fourth paragraphs, and the defendants excepted. The plaintiffs filed a reply by general denial to the fifth paragraph. Sylvester Johnson, one of the defendants, filed a pleading alleging that he was surety in the undertaking for the other defendants.

The cause was, by agreement of the parties, tried by the court, and there was a finding by the court, which is spo-

ken of in the record and in the brief of counsel for the appellants as a special finding. It does not appear to have been made at the request of the parties or any of them, is not signed by the judge, nor incorporated in a bill of exceptions.

The defendants moved the court for judgment on the special finding of the court, and, in the same motion, for judgment in their favor notwithstanding the finding of the court. The court overruled this motion, and the defendants excepted.

The defendants then moved the court for a new trial, for the reasons following: 1st. Because the damages were excessive. 2d. Error of the court in the assessment of the amount of the damages, the same being too large. 3d. The finding and judgment of the court are not sustained by sufficient evidence. 4th. The finding and judgment are contrary to law. 5th. Error of law by the court in the trial and proceedings of said cause, in this, to wit: 1st. The court improperly overruled a demurrer to the complaint. 2d. The court improperly sustained demurrers to the second, third, fourth, and fifth paragraphs of the answer. 3d. The court improperly permitted the plaintiff to read in evidence the undertaking sued on, and the attachment, and the record certified by the clerk of Union county. 4th. The court improperly refused to allow the defendant to ask the questions in writing numbered one, two, three, four, five, six, seven, eight, nine, and ten, respectively, to which the defendants at the time excepted. 5th. That the court improperly overruled defendants' motion in writing to suppress the depositions of G. G. Root and A. E. Smith, as to the defendants John W. Wilson and James Lowry. 6th. The court permitted the plaintiff to give in evidence the testimony marked objected to by the judge in the minutes taken by him. 7th. Error of the court in overruling the motion of the defendants for judgment in their favor on the findings of the court.

This motion was overruled by the court, and the defend-

ants again excepted. Final judgment was rendered by the court, from which the defendants appealed to this court.

The errors assigned are as follows: 1st. The damages are excessive. 2d. The finding and judgment of the court are contrary to law. 3d. The finding and judgment of the court are not sustained by the evidence. 4th. Error of the court in overruling the appellants' demurrer to the complaint. 5th. Error of the court in sustaining the demurrers to the second, third, fourth, and fifth paragraphs of the answer. 6th. Error of the court in refusing to allow answers to questions one, two, three, four, five, six, seven, eight, nine, and ten, as set forth in record, page 16, line 10, *et sequitur*. 7th. Error of the court in overruling the motion of the defendants for judgment on the special finding. 8th. Error of the court in overruling appellants' motion for a new trial.

We may as well, in the first place, eliminate some superfluous matters which are in the record, and then we shall see what remains for our consideration. In the motion for a new trial, under the fifth general reason for a new trial, the subdivision number one, relating to the overruling of the demurrer to the complaint, and that numbered two, having reference to sustaining the demurrers to the paragraphs of the answer, neither of which is a reason for a new trial in any case; the fifth, relating to refusing to suppress depositions, the ground of which is nowhere shown in the record; the sixth, with regard to "admitting in evidence the testimony marked objected to by the judge," which is not presented by the record; and the seventh, which is overruling the defendants' motion for judgment on the special finding, which is not a cause for a new trial, even when there is a proper special finding in the record, must all be disregarded by us for the reasons stated.

In the assignment of errors, the first, second, third, and sixth, which are simply the repetition of some of the reasons for a new trial and are all embraced in the eighth error assigned, and the seventh, which has no valid special finding upon which to rest, must also, all of them, be laid out of the case,

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for the reasons stated. There was no demurrer sustained to the fifth paragraph of the answer. On the contrary, there was a reply to it, as we have already seen. We may be pardoned if we again, and in different language, remark that this court has no power to grant a new trial. The popular idea, that it can or does do so, should cease to influence the action of counsel in the assignment of errors in this court. It is, for this reason, a vain practice, prevailing with many members of the bar of this court, to assign as errors here, that the damages are excessive; that the verdict is not sustained by sufficient evidence, or is contrary to law; that the court erred in the admission or exclusion of evidence, or in instructing or refusing to instruct the jury, or in any other matter which is a reason in the court below for a new trial. It is wholly a matter for the determination of the inferior court, whether there shall or shall not be a new trial granted. When that court has decided the question, its ruling on the point or question may be reviewed in this court, when the grounds upon which the court acted are properly shown by the record which is brought to this court, and when it is assigned for error that the court improperly overruled or granted the motion. The grounds for a new trial are required to be definitely set forth in the written motion; that motion is a proper part of the record, and to it we must look, and not to the assignment of errors, for the causes alleged for the new trial in the court below.

Having pruned the record of those parts which can not aid in the proper determination of the case, let us ascertain what questions are rightly presented for our decision, and what the law is arising upon them. The first question relates to the sufficiency of the complaint. The second concerns the sufficiency of the second, third, and fourth paragraphs of the answer. The third is as to the correctness of the ruling in refusing to grant a new trial. We shall dispose of these questions as here numbered.

The complaint we regard as clearly sufficient. Indeed,

no objection to it is pointed out or relied upon in the brief of counsel for the appellant.

The second, third, and fourth paragraphs of the answer seem to us to add nothing material to the issue as formed by the general denial. Proof of any items of damages properly allowed should have been admitted by the court under that issue, and proof of those which were not proper should have been excluded by the court. Nothing more could have been done if the special paragraphs had been in.

While the question is not very well presented, we think under this division we may properly consider and decide the question which seems mainly to constitute the matter of difference between the parties, and that is as to the allowance of attorney's fees paid or to be paid by the plaintiffs for defending the former action.

There may be different results in an action in connection with which an attachment has been sued out: 1st. The action and the attachment may both be sustained; in which case there can be no suit upon the undertaking. 2d. The action may be sustained, and the attachment may not be sustained, but may have been wrongful and oppressive; in which case it would seem that the attorney's fees for defending against the attachment should be allowed in an action on the undertaking, but not those for defending the action. 3d. When the action and the attachment have both been defeated, there having been no foundation for the action, and consequently no right to sue out the attachment; in which case it seems to us that there can be no distinction made between services rendered in the defence of the action and those rendered in defence of the attachment. In such a case we think the reasonable attorney's fees of the defendant in the action in which the attachment was sued out, for defending both the action and attachment, may be included in the damages allowed in a suit on the undertaking. Sedgwick Measure of Damages, 453; Drake Attachment sec. 175, *et seq.*; *Morris v. Price*, 2 Blackf. 457;

Hoshaw v. Hoshaw, 8 Blackf. 258; *Campbell v. Chamberlain*, 10 Iowa, 337; *Hayden v. Sample*, 10 Mo. 215; *Seay v. Greenwood*, 21 Ala. 491. It is attempted to discriminate between the fees paid to attorneys of the Union Circuit Court, and those paid before the change of venue was granted. We think this can not be done. The defendants in the action had a legal right to a change of venue, and the taking of such change can not make any difference in their right to recover their reasonable attorney's fees, whether for services in Wayne or in Union county.

The evidence is not all in the bill of exceptions. We can not therefore say that the damages were excessive, or that the finding of the court was not sustained by sufficient evidence.

The judgment is affirmed, with costs.

DUKE v. STRICKLAND.

CHATTEL MORTGAGE.—*Growing Crop.—Effect of Recording.*—Where ten acres of growing wheat was mortgaged, and the mortgage duly recorded, and afterward the mortgagor, without the consent or knowledge of the mortgagee, harvested, threshed, removed, and sold the wheat, and the purchaser converted it to his own use by mixing it with other wheat;

Held, that the title to the wheat was vested in the mortgagee, and the recording of the mortgage was constructive notice to the purchaser.

Held, also, that the mortgagee could recover the value of the wheat of the purchaser, by identifying the wheat purchased as the wheat that was mortgaged, though the purchaser bought the wheat in the usual course of trade, and without actual notice.

SAME.—*Evidence.*—Parol Evidence is admissible to identify chattels mortgaged.

SAME.—*Possession.*—The recording of a chattel mortgage, under the tenth section of the statute of frauds (1 G. & H. 352), dispenses with the necessity of an actual delivery of the property to the mortgagee. *McCord v. Cooper*, 30 Ind. 9, overruled.

43	494
125	436
127	362
43	494
152	51

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From the Henry Circuit Court.

J. Brown and *R. L. Polk*, for appellant.

M. L. Bundy, for appellee.

BUSKIRK, J.—This action was brought by the appellant against the appellee, to recover the value of one hundred bushels of wheat, the property of the appellant, converted by the appellee to his own use.

It is alleged in the complaint, that one John Hosier, on the 3d day of June, 1871, being the owner of a ten-acre field of growing wheat on the north-west quarter of the south-west quarter, of section thirty-four, township eighteen, range ten, in Henry county, Indiana, and which was all the wheat growing on said land, mortgaged the same to the appellant, with other property, to secure a note of five hundred dollars, due December 25th, 1871; that the said mortgage was, on the day of its execution, duly recorded in the recorder's office of said county; that the mortgagor afterward, without the consent or knowledge of the mortgagee, harvested, and after night threshed, and clandestinely, fraudulently, and unlawfully removed and sold the same to the appellee, who upon demand by the appellant, refused to deliver up or pay for said wheat, but tortiously converted the same to his own use and mixed it with other wheat and shipped and sold it in a foreign market. A copy of the mortgage was filed with the complaint. A judgment for one hundred and fifty dollars was demanded.

A demurrer was sustained to the complaint, and this ruling is assigned for error and presents the only question for our decision.

The appellee was engaged in lawful commerce, and if Hosier clandestinely and fraudulently threshed and sold the wheat without the knowledge of the appellant, it is not alleged that the appellee had any knowledge of the alleged fraudulent practices of Hosier; but he seems to have purchased and paid for the wheat in the ordinary course of trade; nor is it alleged that the wheat was offered for sale

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under circumstances calculated to excite suspicion or invite inquiry.

The appellant seems to base his right to recover upon the fact that the record of the mortgage for ten acres of growing wheat in the field was constructive notice to the appellee of his claim for wheat in the bushel, when offered for sale in the market and sold in the regular course of trade, the purchaser having no actual notice.

It is sufficiently shown in the complaint that the appellee converted the wheat to his own use.

It is claimed by counsel for appellant, that as the mortgage is silent as to the possession of the mortgaged property, the mortgagee was entitled to the immediate possession; and that the mortgage being recorded, it was notice to all the world; and that the appellee was, therefore, a purchaser with notice.

It is conceded by counsel for appellee, that the mortgage when recorded was constructive notice of the contents of the mortgage as it appeared of record, and nothing more, and in support of such position reference is made to *Frost v. Beekman*, 1 Johns. Ch. 288.

In that case a mortgage was made for three thousand dollars, but the register in entering it of record, stated that the mortgage was for three hundred dollars, and the court held that the registry was notice of the contents of the mortgage as it appeared of record and no more. And the court further held, that the purchaser was not put upon inquiry and was not bound to hunt up the mortgage or mortgagee and ascertain the truth. According to the ruling in that case, it is insisted, the mortgage was only notice that the appellant held a mortgage on ten acres of growing wheat in the field, and that that was not sufficient to put the appellee upon inquiry when the mortgagor offered for sale wheat in the bushel.

It is also insisted by counsel for appellee, that the description of the property mortgaged was too vague and indefinite to constitute notice to a subsequent *bona fide* purchaser; and reference is made to the case of *McCord v. Cooper*, 30 Ind.

9, which was an action of replevin for four oxen by the mortgagee of a chattel mortgage of "three yoke of oxen." The oxen remained in the possession and exclusive control of the mortgagor, who sold the oxen to two persons for a valuable consideration, who had no actual notice that the property was affected by the mortgage. The oxen were sold four times for a valuable consideration to *bona fide* purchasers, and were finally sold to the defendant for a valuable consideration, who purchased without any actual notice of the mortgage. The question in the case was, whether the description of the mortgaged property was sufficiently certain and definite to constitute constructive notice. The court say: "The question presented is, whether the registry of the chattel mortgage, describing the property as stated, was notice to a subsequent *bona fide* purchaser. It is very clear that the mortgage contained no such description of the oxen as would enable any one to identify them; nay, the description given would not even aid in distinguishing them from any other oxen. It was almost as indefinite as it was possible to make it. For all practical purposes, as notice, it would have been quite as well to have used the phrase 'six head of cattle.' In either case, any one actually seeing the registry would find nothing to inform him that the property in controversy was meant; and if it was in the apparent ownership of a stranger, as was here the fact, he would perceive nothing whatever to arouse any suspicion that these, rather than any other property of the same general class, were intended to be incumbered.

"We all agree that actual knowledge of the contents of this mortgage would not have been sufficient to put a purchaser from a third person on inquiry. But the question is as to the effect of the mere registry as constructive notice. That it has the effect of constructive notice of the contents of the instrument as registered, is very plain. Has it any further effect? Does the registry put a purchaser upon inquiry, as where he has actual knowledge of the contents of

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the instrument? *Frost v. Beekman*, 1 Johns. Ch. 288, and *Fennings' Lessee v. Wood*, 20 Ohio, 261, are instructive cases upon that question. The case before us does not, however, demand any opinion upon that question. If an actual knowledge of the contents of the mortgage would not have been sufficient to charge the defendant with notice, surely the mere registry would not."

The ruling in the above case was based upon the theory that the property mortgaged should be described with such certainty and particularity that it could be identified by the description without the aid of parol evidence. It is well settled that parol evidence is admissible to show the identity of the property mortgaged. *Chapin v. Cram*, 40 Maine, 561; *Skowhegan Bank v. Farrar*, 46 Maine, 293; *Elder v. Miller*, 60 Maine, 118; *Brooks v. Aldrich*, 17 N. H. 443; *Harding v. Coburn*, 12 Met. 333; *Comins v. Newton*, 10 Allen, 518; *Putnam v. Cushing*, 10 Gray, 334; *Crosby v. Baker*, 6 Allen, 295; *Morrill v. Keyes*, 14 Allen, 222; *Lawrence v. Evarts*, 7 Ohio St. 194; *Morse v. Pike*, 15 N. H. 529; *Burditt v. Hunt*, 25 Maine, 419; *Wolfe v. Dorr*, 24 Maine, 104; *Winslow v. Merchants Ins. Co.*, 4 Met. 306; *Welch v. Sackett*, 12 Wis. 243; *Smith v. Jenks*, 1 Den. 580.

In *Elder v. Miller*, *supra*, the description in the mortgage was, carriages, phaetons, eight horses, etc., the said property being in a certain building or stable, which was described. Other horses were being boarded there. The court admitted parol evidence to identify the horses mortgaged and enforced the mortgage.

In *Brooks v. Aldrich*, *supra*, the mortgage was of two horses belonging to the mortgagor, and the description was held sufficient.

In *Harding v. Coburn*, *supra*, a mortgage of "all and singular, the stock, tools, and chattels belonging to' the mortgagor, 'in and about the wheelwright's shop occupied' by him," was held valid. In discussing the necessity of resorting to parol evidence to identify the mortgaged property, DEWEY, J., says: "Take the case of a mortgage of live-stock on a farm; the gen-

eral description would be, 'all my stock on my farm.' The particulars are, 'ten cows, two yoke of oxen,' etc.; but in both you must rely upon other sources than the mortgage for the identity of the property mortgaged."

In *Lawrence v. Evarts, supra*. the court, after citing several cases, say :

"The principle to be deduced from these cases is, that any description which will enable third persons to identify the property, aided by inquiries which the mortgage itself indicates and directs, is sufficient. The identity of the property is not, in such cases, ascertained by any specific description which distinguishes it from other property of the same kind or species, but by its locality."

The word. "locality" in the above opinion had reference to the description of the property mortgaged in *Harding v. Coburn, supra*.

In our opinion the case of *McCord v. Cooper*, 30 Ind. 9, is not supported by authority or on principle, and is overruled.

It is conceded by counsel for appellee, that the mortgage as recorded was constructive notice that the appellant held a mortgage on the ten acres of growing wheat therein described, but it is insisted that after the wheat was harvested, threshed, and offered for sale in the market, it had undergone such a change as rendered it incapable of identification, and that a purchaser would not be put upon inquiry as to whether it was the same wheat as the growing wheat described in the mortgage.

In *Comins v. Newton, supra*, the rifle described in the mortgage "was in the form of a pistol stock, with a metallic skeleton stock, and an under action lock," and the lock being broken and in need of repairs, the mortgagor took it to the gunsmith and caused a wooden stock to be substituted for the other, and an over action lock to be put on the upper side instead of the under action lock.

The court held that the right of property in the mortgagee was not divested by the repairs and changes made upon the rifle in the hands of the mortgagor, as the weapon

was capable of identification by parol evidence, as the one originally included in the mortgage.

In *Crosby v. Baker, supra*, the property mortgaged included a quantity of "assorted pickles," of the value of four hundred and three dollars and eighty-five cents, which at the date of its execution were in bulk and in salt, but were subsequently "greened" and put into bottles and vinegar, which the plaintiff could not identify as the pickles included in the mortgage; but upon proof being made that the pickles in bottles were the same mortgaged, the court held that the property had not undergone such a material change as to defeat the right of the mortgagee.

In *Putnam v. Cushing*, 10 Gray, 334, a mortgage of leather, cut and prepared for the manufacture of shoes, was held to cover shoes subsequently made from it by the mortgagor. The court say: "In the opinion of the court, the property still remained in the mortgagee, notwithstanding the change by the completion of the work as originally designed, the materials being cut and prepared therefor before the mortgage. It was not the case of a new acquisition of articles of property, not held by the mortgagor at the time of making the mortgage; but merely of labor performed upon materials and stock of the plaintiff acquired by his mortgage."

In *Perry v. Pettingill*, 33 N. H. 433, it was held, where a debtor mortgaged a number of unfinished pruning shears, and the mortgagor finished the shears, and thereby greatly added to their value, that, in the absence of fraud, the fact that the shears had been greatly increased in value by the labor of the mortgagor, would not invalidate the mortgage, and that the mortgagee could hold against an attachment by another creditor of the mortgagor.

In *Coles v. Clark*, 3 Cushing, 399, it was held, where the mortgagor of goods, of which the mortgagee had the right of immediate possession by a mortgage duly recorded, induced the mortgagee, by false and fraudulent representations, to allow the goods to remain in his possession for a certain period, during which the mortgagor, for the purpose

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of cheating and defrauding the mortgagee, sent the goods to an auctioneer, by whom they were sold and the proceeds paid over to the mortgagor, that the mortgagee might maintain trover for the goods against the auctioneer, although the latter did not participate in the fraud of the mortgagor, and had no knowledge in fact of the existence of the mortgage.

In *Smith v. Jenks*, 1 Den. 580, Arnold, a tenant of Hunt, executed a mortgage to Smith upon six acres of grass growing on the land of Hunt, which Arnold subsequently cut and stacked upon other land occupied by him, and was retained in his possession for several months, when it was levied on by an execution against Arnold and purchased by Jenks. In an action by the purchaser against the mortgagee, it was held that the hay was subject to the mortgage, and the sale upon execution was held to be void.

This is a strong case and much in point, for the hay in that case could no more be identified than the wheat in the bushel in the case under consideration.

The court in *Coles v. Clark*, *supra*, say:

“We must take it as settled, that a mortgage of a chattel vests a property in the mortgagee; not an absolute title, indeed, but a present title, defeasible upon a condition subsequent. An actual delivery and change of possession is not necessary to perfect the mortgagee's title, if the mortgage is duly recorded; the registration of the mortgage supersedes the necessity of an actual delivery, and gives all parties concerned constructive notice of its execution and existence. It seems to follow, as a necessary consequence, that goods mortgaged may be safely left by the mortgagee in the custody of the mortgagor, without the former's being chargeable with *laches*. Indeed, the most common object of such a mortgage is to enable the mortgagor to give security on the goods, and yet for the time being, to retain the custody and use of them. Another consequence of this relation is, that, as a general rule, the right of possession follows the right of property; and, therefore, where there is no restraining stipulation, the mortgagee having the right of

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property, until defeated by the performance of the condition, has as incident thereto the right of possession, and may therefore take the goods into his own custody, or maintain trespass or trover for them, against any one who takes or converts them to his own use."

The doctrine laid down in the above case applies with equal force in this State. The tenth section of our statute of frauds provides, that "no assignment of goods by way of mortgage shall be valid against any other person than the parties thereto, where such goods are not delivered to the mortgagee or assignee and retained by him, unless such assignment or mortgage shall be acknowledged, as provided in cases of deeds of conveyance, and recorded in the recorder's office of the county where the mortgagor resides within ten days after the execution thereof." 1 G. & H. 352. Under the above section the recording of the mortgage dispenses with the necessity of an actual delivery of the property mortgaged, to the mortgagee. The mortgage vested the title in the growing wheat in the mortgagee, and the recording of it created constructive notice to the appellee. We do not think that the change which the wheat underwent changed the property so as to divest the title of the mortgagee. Under the rule as settled by the cases referred to, the appellant would have the right, on the trial, to prove by parol that the wheat purchased by the appellee was the same wheat that was mortgaged. The appellant was only bound to identify the wheat at the time it was offered for sale. The appellee having confused and mixed the wheat with his other wheat, he could not complain that the wheat could not be identified after it had been confused.

We are of the opinion that the court erred in sustaining the demurrer to the complaint.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to overrule the demurrer to the complaint, and for further proceedings in accordance with this opinion.

MCKERNAN v. NEFF ET AL.

43	503
153	535

MORTGAGE.—Senior and Junior Mortgages.—Redemption.—Proceeds of Sale on Foreclosure.—A. mortgaged certain real estate to B. Afterward he made a second mortgage on the same real estate to C., and after that a third mortgage to D. C. assigned his note and mortgage to E. B. foreclosed his mortgage, and D. was a party to the proceeding and filed his cross bill against the mortgagor, but he was not served with process, nor did he appear to the cross bill. Neither C. nor E. was made a party, nor had they notice of the proceeding. The decree ordered the sale of the real estate and directed the proceeds to be first applied to the payment of B.'s mortgage, second to the payment of D.'s mortgage, and the overplus, if any, to be paid to the mortgagor. The real estate was sold on the decree, and D. became the purchaser. B.'s mortgage was paid out of the proceeds, and the residue with the consent of the mortgagor was paid to D. After the sheriff's sale the mortgagor conveyed the real estate by warranty deed to D., and D. afterward sold and conveyed to F., and after the expiration of one year he also received a deed from the sheriff. A. at the time of the decree was insolvent, and so continued to be, and the real estate became so depreciated in value that it was not worth more than the amount of the mortgage of B.

Held, that the decree of foreclosure and the sale of the real estate did not affect the rights of E.

Held, also, that the equity of the mortgagor and all other parties to the action were barred by the decree and sale; but as to E., the proceedings only had the effect of transferring to the purchaser the interest of the mortgagee in the mortgage foreclosed, and he occupied the position of an assignee.

Held, also, that E. could foreclose his mortgage, and redeem the mortgaged premises by paying the amount of B.'s mortgage, as if there had been no foreclosure.

Held, also, that E., having lost no rights by the foreclosure, had no right to any avails of the sale, or any equity that authorized a marshalling of the surplus according to priorities.

Held, also, that a depreciation in the value of the real estate since the sheriff's sale could not affect the rights of the parties.

JUNIOR MORTGAGE.—Recording.—Notice to Purchaser under Senior Mortgage.—

If a junior mortgage has been duly recorded, a purchaser of the mortgaged premises on a foreclosure rendered on a senior mortgage will be presumed to have bid and purchased with reference to the junior mortgage, and with knowledge of the right of the holder of that mortgage to redeem.

SAME.—A purchaser from one who bought at a sheriff's sale under a decree of foreclosure will be affected by all defects and irregularities of the sale that appear of record, and is bound to take notice of a junior mortgage and that the holder of such mortgage was not a party to the foreclosure proceedings.

McKernan v. Neff *et al.*

SAME.—A middle mortgagee, who was not a party to proceedings of foreclosure on the senior mortgage, cannot elect to affirm a sale made to the junior mortgagee on a decree rendered upon the senior mortgage in such proceedings, and recover of the junior mortgagee the surplus after paying the senior mortgage.

From the Marion Superior Court.

J. T. Dye and *A. C. Harris*, for appellant.

T. E. Johnson, *N. B. Taylor*, and *E. Taylor*, for appellees.

OSBORN, J.—It will not be necessary to set out the pleadings in this case. The questions involved will sufficiently appear by the following statement:

On the 13th of February, 1865, David S. McKernan executed a mortgage on certain real estate in Indianapolis to Tompkins A. Lewis.

On the 5th of June thereafter he executed another mortgage upon the same real estate to one Edward P. Quinn, to secure a promissory note of that date for five hundred dollars payable six months after date.

On the 10th of January thereafter, he executed another mortgage upon the same real estate to James H. McKernan, the appellant.

Each of the mortgages was duly recorded.

Quinn sold and assigned his note and mortgage to the appellees.

In 1866, Lewis instituted an action to foreclose his mortgage, to which James H. McKernan, the appellant, was a party and filed his cross bill against David S. McKernan, to foreclose his mortgage. David S. McKernan was not served with process in the cross complaint and did not appear to it. Neither Quinn nor the appellees were made parties to the action or had any notice of it. There was a decree of foreclosure, and that the proceeds of the sale should be applied first to the payment of the amount of Lewis' mortgage, interest, and costs, and next to the amount of the appellant's mortgage, and the overplus, if any, to be paid to the mortgagor. The property was sold by the sheriff on the decree, to the appellant, for the sum of nine thousand two hundred

and thirty-nine dollars and eighty-six cents, which he paid to the sheriff and received a certificate of sale. The sum of seven thousand eight hundred and fifty dollars and seventy-six cents was applied to the payment of Lewis' decree, interest, and costs, and the sum of one thousand three hundred and eighty-nine dollars and ten cents, being the overplus, was paid to the appellant on and in satisfaction of his mortgage. The last mentioned sum was paid to the appellant with the assent of the mortgagor, who, after the sheriff's sale, conveyed the mortgaged property to the appellant by warranty deed. Afterward the appellant sold and conveyed the property by warranty deed to one Johnson for nine thousand two hundred and fifty dollars. He also assigned to him the sheriff's certificate of sale, and at the expiration of one year from the date of the sale, Johnson received a deed from the sheriff. The mortgagor was, at the time of the decree of foreclosure, and has been ever since, wholly insolvent. Since the sale to Johnson, the property has so depreciated, that it would not sell for more than enough to pay off Lewis' decree.

A demurrer to the complaint was overruled, and an answer filed, to which a demurrer was sustained. Exceptions were taken to both the rulings. The appellant failing to amend his answer, final judgment was rendered against him for the amount due on the Quinn note and mortgage.

We do not think it necessary to set out the answer. It does not materially affect the case. If the complaint is good, the answer is bad.

An appeal was taken to the general term, where the judgment was affirmed. From that judgment an appeal has been taken to this court.

The errors assigned in general term were in overruling the demurrer to the complaint, and in sustaining the demurrer to the answer. The error assigned in this court is, that the court below in general term affirmed the judgment of the court below in special term.

The decree of foreclosure and sale of the mortgaged prem-

McKernan v. Neff et al.

ises have not affected the rights of the appellees. Their mortgage was junior to Lewis' and senior to the appellant's. The equities of the mortgagor and all other parties to the action are barred by the decree and sale. As to the appellees, the foreclosure can only have the effect to transfer to the purchaser the interest of the mortgagee in the mortgage foreclosed, who occupies the position of an assignee. *Arnot v. Post*, 6 Hill N. Y. 65; *Murdock v. Ford*, 17 Ind. 52, and cases there cited; *Waller v. Harris*, 7 Paige, 167.

How have the appellees been prejudiced by the sale? They can foreclose their mortgage and redeem by paying the amount of Lewis' mortgage as well as if his had not been foreclosed. Their rights and interests were neither sold nor barred. They remain unaffected. If they were not sold, what right had they to any of the purchase-money? Their mortgage was subject to Lewis'. The appellant's mortgage was subject to theirs. That is their exact position now. The mortgage held by the appellees had been duly recorded, and the purchaser will be presumed to have bid and made the purchase with reference to it; *De Ruyter v. The Trustees, etc.*, 2 Barb. Ch. 555; and also with reference to the right of the holder of that mortgage to redeem on payment of the amount of the Lewis mortgage, and that he would stand in the position of an assignee of that mortgage as against the holder of the Quinn mortgage, then held by the appellees. *Arnot v. Post* and *Murdock v. Ford*, *supra*.

Johnson occupies no better position as to the title of the property than the appellant would if he had not made the sale. His title is derived through the sale on the decree of foreclosure, and he will be affected by all defects and irregularities of the sale that appear of record. *Piel v. Brayer*, 30 Ind. 332. He was bound to take notice of the Quinn mortgage, that it was senior to the appellant's, and that the holder had not been made a party to the foreclosure suit through which he derived title.

The appellees having lost no rights by the foreclosure,

and no interests of theirs having been sold, they have no right to any of the avails of the sale.

When they seek to redeem, there may be a question between them and Johnson, if he is in possession, as there was in *Murdock v. Ford*, as to how far he must account for rents, waste, etc. But we need not discuss or pass upon it in this case. Nor is it necessary for us to consider the questions which may arise between Johnson and the appellant, in an action for breach of covenant upon his deed. We will not anticipate such an action. It is foreign to the question before us.

Whether the mortgaged property has increased or diminished in value since the sheriff's sale, or whether the appellant has sold at a profit or loss, cannot affect the rights of the parties in this action. The note secured by the Quinn mortgage became due in December, 1865, more than a month before the mortgage was given to the appellant. The decree of foreclosure of the Lewis mortgage was rendered in May, 1866, and the sale under the decree to the appellant was made on the 28th day of July, 1866. This action was commenced on the 19th day of May, 1871. The appellees have taken no steps to collect their debt by foreclosure or otherwise, or to redeem the mortgaged premises. It will cost no more to redeem now than it would before the sheriff's sale, except the accumulated interest. Their right to redeem still remains. It is optional with them now, as it has been, whether they will avail themselves of such right or not.

The appellees claim that the "surplus shall be marshalled according to the priorities of the equities." We have seen that the appellees had no equities in or to the surplus. Consequently, it was not a case for marshalling the surplus. "In the sense of the courts of equity, the marshalling of assets is such an arrangement of the different funds under administration as shall enable all the parties, having equities thereon, to receive their due proportions, notwithstanding any intervening interests, liens, or other claims of particular persons

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to prior satisfaction, out of a portion of these funds." Story Eq., sec. 558.

It is also suggested that the appellees could elect to recognize the sale as valid, and demand enough of the surplus after paying off the Lewis mortgage to satisfy theirs. But the appellant cannot be compelled to become the purchaser of their interest against his will. He did not purchase any interest of theirs at sheriff's sale, and they cannot compel him to pay for it by electing to affirm a sale which was never made. What the appellant purchased was the mortgagor's equity of redemption in satisfaction of the mortgage, as between them; and as against the appellees, he became the purchaser and assignee of the mortgage to Lewis.

The demurrer to the complaint ought to have been sustained.

The judgment of the Marion Superior Court is reversed, with costs. The cause is remanded, with directions to the court in general term to reverse the judgment of the special term, and to remand the cause to the special term, with instructions to sustain the demurrer to the complaint, and for further proceedings in accordance with this opinion.

THE CITY OF TERRE HAUTE *v.* RIPLEY.

BILL OF EXCEPTIONS.—Where ninety days were given in which to file a bill of exceptions, and it was not shown when the bill was filed;
Held, that it was not properly in the record.

From the Vigo Common Pleas.

W. E. McLean, I. N. Pierce, and W. W. Rumsey, for appellant.

J. P. Baird, C. Cruft, J. M. Allen, and W. Mack, for appellee.

DOWNEY, C. J.—It would serve no useful purpose to state

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the questions which the appellant attempts to present in this case any further than to say that they all depend upon the bills of exceptions. The objection to their consideration is made by the appellee, that the bills of exceptions are not properly in the record. Ninety days were given by the court in which to file the bills of exceptions, and it is not shown when they were filed. It has often been decided by this court that in such cases the record must show affirmatively that the bills of exceptions were filed within the time allowed. *Warner v. Campbell*, 39 Ind. 409; *Stivers v. McConnell*, 39 Ind. 240; *Port v. Russell*, 36 Ind. 60, and cases there cited.

The judgment is affirmed, with two per cent. damages and costs.

HALLEY v. THE STATE.

CRIMINAL LAW.—*Indictment.*—*Obtaining Money by False Pretenses.*—An indictment for obtaining money by false pretenses, under section 27, 2 G. & H. 445, must allege whose money was obtained.

From the Floyd Criminal Circuit Court.

J. H. Stotsenburg, for appellant.

J. C. Denny, Attorney General, for the State.

PETTIT, J.—This is the indictment in this case :

“The grand jurors for the county of Floyd, in the State of Indiana, upon their oath present that Harry Halley and Charles Dewane, on the 27th day of June, 1872, at said county of Floyd, feloniously, designedly, and with intent to defraud one Martha Saul, did falsely pretend to the said Martha Saul that they, the said Harry Halley and Charles Dewane, were then agents of the government of the United States, for the purpose of selling goods and merchandise

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which had fallen into the possession of the United States during the late war; and that the said Harry Halley and Charles Dewane then and there produced and exhibited to the said Martha Saul written powers of attorney, purporting to authorize them to act as such agents, and containing rules for the disposition and sale of said goods; that under said rules by them presented as aforesaid, at the time and place aforesaid, each order for such goods costs two dollars, one dollar of which to be paid at the time of the sale of the order, and the other dollar to be paid at the expiration of ten days from the sale of the order, at which time they then and there pretended they were required to deliver the goods named in the order sold; and that they, the said Harry Halley and Charles Dewane, then had a large stock of goods of great value to dispose of in the manner aforesaid; by means of which said false pretences, the said Harry Halley and Charles Dewane, did then and there induce the said Martha Saul to purchase five of said orders for goods, and did then and there feloniously obtain from the said Martha Saul the sum of five dollars, with intent then and there to cheat and defraud her, the said Martha Saul; whereas, in truth and in fact, the said Harry Halley and Charles Dewane were not then and there agents of the government of the United States for the purpose of selling goods and merchandise; that said powers of attorney and rules were not genuine, but fictitious, and they, the said Harry Halley and Charles Dewane, had not then a large stock of goods of great value, or any goods to dispose of in manner aforesaid; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana."

There was a motion made to quash the indictment, but it was overruled and exception taken, and this is assigned for error. A plea of not guilty was put in, and after hearing the evidence of the State, Dewane was discharged by the court, there being no evidence against him, under sec. 106, 2 G. & H. 416. The trial against Halley resulted in his conviction and sentence to the penitentiary for five years. Is

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this indictment good for obtaining money by false pretences? We hold that it is not.

The indictment was found under sec. 27, 2 G. & H. 445, and it may be bad for many reasons, but we need not notice but one defect, as that is fatal as to its sufficiency. It does not charge or allege that the money obtained from Margaret Saul was her money or property. In two cases in this court directly in point, it has been held that this allegation is absolutely essential to the validity of the indictment, and we adhere to these rulings. *The State v. Smith*, 8 Blackf. 489; *Leobold v. The State*, 33 Ind. 484.

The judgment is reversed, with instructions to the court below to quash the indictment; and the clerk of this court will issue the proper order for the return of the prisoner.

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171	645

CRIMINAL LAW.—Venue.—Upon the trial of a criminal action, the evidence must show in what county and state the offence was committed.

SAME.—Repeal of Law.—Where at the time of the reversal by the Supreme Court of a judgment in a criminal action the violated law has been repealed without the saving of pending actions, the defendant cannot be again put upon trial.

From the Putnam Circuit Court.

F. T. Brown and *J. Hanna*, for appellant.

J. C. Denny, Attorney General, for the State.

BUSKIRK, J.—The appellant was convicted under the act of 1859, for selling liquor by retail, without a license. The court, over a motion for a new trial, rendered a judgment on the verdict. Several errors are assigned, and various questions are discussed in reference to the sufficiency of the indictment, the admission and exclusion of evidence, and the giving of instructions; but the conclu-

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sion to which we have come renders it unnecessary for us to pass upon any of these questions.

The judgment must be reversed for a failure of proof. There is no evidence in the record showing that the offence was committed in the State of Indiana or in the county of Putnam. We are compelled to reverse a judgment in a criminal case, when the evidence does not show in what county or state the offence was committed. The bill of exceptions professes to contain all the evidence. *Jackson v. The State*, 19 Ind. 312; *Baker v. The State*, 34 Ind. 104.

It appears from the evidence that the offence, if any, was committed while the act of March 5th, 1859, was in force. This act was repealed by the act of February 27th, 1873. There is no saving clause. The appellant can not again be put upon trial, the violated law having been repealed, without a clause saving pending actions. *Whitehurst v. The State*, ante, p. 473.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to discharge the defendant.

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PRACTICE.—*Special Finding.*—Where the court, the record not showing it to have been requested by either party, finds the facts specially and states conclusions of law thereon, a motion for a new trial can raise no question for review as to the correctness of such conclusions.

From the Morgan Circuit Court.

W. R. Harrison and *W. S. Shirley*, for appellant.

C. F. McNutt and *G. W. Grubbs*, for appellee.

WORDEN, J.—Complaint by the appellant against the

43	512
135	614
43	512
147	306
43	512
168	81

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appellee, alleging, in substance, that on the 2d of March, 1871, the plaintiff sold to the defendant certain real estate, described, at a stated price per acre, amounting in all to the sum of seven thousand two hundred and seventy dollars and sixty-two cents, which sum the defendant agreed to secure by executing to the plaintiff three several promissory notes, with good freehold sureties, bearing ten per cent. interest from date, payable at nine, eighteen, and twenty-four months; that the sale had been duly confirmed by the proper court of common pleas, and that the plaintiff had executed and tendered to the defendant a deed for the property, and demanded that he execute to the plaintiff the notes as stipulated for, but the defendant refuses to do so, though he has had possession of the land continuously since the sale; wherefore, etc. The cause was put at issue and tried by the court. The court, without appearing by the record to have been requested to do so by either party, found the facts specially and stated conclusions of law thereon adverse to the plaintiff. The record, after stating the conclusions of law, proceeds to say, "therefore" the court "found for defendant on the issues in the case." The plaintiff did not except to the conclusions of law stated by the court upon the facts found, but moved for a new trial, assigning as reasons therefor:

" 1. The decision of the court is contrary to the evidence.

" 2. The decision of the court is contrary to the law.

" 3. The decision of the court is contrary to, and not sustained by, the finding of facts by the court.

" 4. The court erred in matter of law upon the trial, in this, that after finding in fact for plaintiff, and such facts as entitled plaintiff to recover in said action, the court, notwithstanding such finding of facts, found for defendant."

The evidence is not in the record, nor is any question presented by the motion for a new trial, unless it be whether or not the court erred in its conclusions of law upon the facts found.

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Section 341 of the code, 2 G. & H. 207, provides, that "upon trials of questions of fact by the court, it shall not be necessary for the court to state its finding, except generally, for the plaintiff or defendant, unless one of the parties request it, with a view of excepting to the decision of the court upon the questions of law involved in the trial, in which case the court shall first state the facts in writing, and then the conclusions of the law upon them, and judgment shall be entered accordingly."

In *Nash v. Caywood*, 39 Ind. 457, it was held by this court that where it did not appear that a special finding was made by the request of one or both of the parties, it must be regarded as nothing more than a general finding, and not within the section of the statute above quoted. If the finding in this case is regarded as only a general one, there is no question presented by the record. The evidence, as before remarked, is not in the record; no error appears to have been committed in the trial of the cause, nor is any reason shown why a new trial should have been granted.

But if the finding were to be regarded as a special one, as contemplated by the section quoted, in order to raise any question as to the correctness of the conclusions of law upon the facts found, exception must have been taken to such conclusions; and an error in such conclusions is not reached by a motion for a new trial. *Welch v. Bennett*, 39 Ind. 136. The leading object of the section seems to have been to enable parties to except to the conclusions of law on the facts being found. The finding of facts, and the statement of conclusions of law upon them, are very different things. The facts may be correctly found, but the conclusions of law stated thereon may be very erroneous. Where the facts are correctly found, though the conclusions of law may be erroneous, what good purpose could be subserved by having the facts found over again upon a new trial? The remedy for erroneous conclusions upon the facts found is furnished by an exception, and not by a re-examination of

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the facts themselves. In any aspect of the record, it fails to present any question for our consideration.

The judgment below is affirmed, with costs.

RUSTON v. BIDDLE.

PLEADING.—Malicious Prosecution.—In an action for malicious prosecution, to allege that the defendant falsely, maliciously, and without any reasonable or probable cause, filed his affidavit charging the plaintiff with having committed a criminal offence, is sufficient, without repeating the allegation of malice and want of probable cause in connection with the averments concerning the issuing of the warrant, the arrest, and the imprisonment.

BILL OF EXCEPTIONS.—Where no time has been asked or given at the time of the making of a decision, within which to file a bill of exceptions, a bill filed at a subsequent term, at the time of the rendition of judgment, does not become a part of the record.

From the Tipton Circuit Court.

R. B. Beauchamp, J. Green, and D. Waugh, for appellant.

N. R. Overman, N. W. Parker, and J. T. Cox, for appellee.

DOWNEY, C. J.—This was an action for malicious prosecution, brought by the appellee against the appellant, in which there was judgment for the plaintiff. There are three errors properly assigned in this court. 1st. The overruling of a demurrer which was filed by the defendant to the complaint. 2d. Overruling the defendant's motion for a new trial. 3d. Overruling his motion in arrest of judgment.

The first and third assignments of error present the same question, that is, the sufficiency of the complaint. The complaint alleges that heretofore, to wit, on, etc., at, etc., the defendant falsely, maliciously, and without any reasonable or probable cause whatever, filed his affidavit with one Campbell, a justice of the peace, charging the plaintiff with having committed the crime of trespass, on, etc., at, etc., by unlawfully cutting down, on lands of the defendant, in said county, one green cotton-wood tree, of the value of five

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dollars, the property of the defendant, without having a license so to do from the defendant, etc., and that, upon the filing of the affidavit, the defendant procured a warrant to be issued against the plaintiff by the justice of the peace, and procured the arrest and imprisonment of the plaintiff thereon; that he was arrested on the 13th day of March, 1872, and forcibly taken before the justice of the peace, and deprived of his liberty for the space of six hours, and was compelled to and did enter into recognizance to appear before the justice of the peace on the 19th day of March, 1872, for trial; that he appeared before the justice of the peace on that day, was tried, acquitted of said offence, and discharged; that he was wholly innocent, etc. He further alleged that by means of said prosecution he was put to great expense and trouble in making his defence and procuring his release, in this, to wit: he paid twenty-five dollars for attorney's fees, was hindered from his work for six days, and suffered great pain and anxiety of mind, to his damage, etc.; wherefore, etc.

The objection urged to the complaint is, that it does not aver that the defendant maliciously and without probable cause had the warrant issued and caused the plaintiff to be arrested upon the warrant issued by the justice of the peace; that the allegation, that the defendant falsely, maliciously, and without any reasonable or probable cause whatever, filed his affidavit, etc., is not sufficient, without alleging that the issuing of the warrant and the arrest, etc., by virtue of the warrant, were also malicious and without probable cause. We think this is not a valid objection to the complaint. It was not necessary to repeat the allegation of malice and want of probable cause in connection with the arrest and imprisonment of the plaintiff. It is alleged that the charge was false, was without probable cause, was malicious, that it terminated in the acquittal and discharge of the plaintiff, and that the plaintiff was damaged thereby. These are the essential elements of a cause of action for a malicious prosecution.

The questions arising or sought to be presented under the assignment of error, relating to the overruling of the motion

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for a new trial, depend upon the bill of exceptions. If that is not properly in the record, they do not arise and can not be legally decided by us. The trial took place at the May term, 1872; the motion for a new trial was then presented, considered, and overruled. The defendant excepted, but no time was asked or given in which to file the bill of exceptions. The judgment was rendered on the 9th day of November, 1872, during the November term of the court, and the bill of exceptions was then filed. It is only necessary to refer to the statute to settle this question. It is enacted in the three hundred and forty-third section of the code, 2 G. & H. 209, that the party objecting to the decision must except at the time the decision is made; but time may be given to reduce the exception to writing, but not beyond the term, unless by special leave of the court. We can not regard the bill of exceptions as properly in the record.

The judgment is affirmed, with five per cent. damages and costs.

HUSTON v. ROOSA.

ACTION.—*Relief from Forged Instrument.*—One whose name has been forged to a negotiable instrument may maintain an action against an indorsee of such instrument, to compel a surrender of such forged instrument, or a release from liability thereon; and in such action, the court may render a judgment releasing the person whose name is forged from all liability, and as to him declaring the instrument null and void.

From the Wayne Common Pleas.

W. A. Peelle and *H. C. Fox*, for appellant.

W. A. Bickle and *J. B. Julian*, for appellee.

WORDEN, J.—Complaint by the appellee against the appellant and one J. C. Fitzgerald, alleging "that heretofore to

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wit, on the 15th day of December, 1869, at said county of Wayne, the said defendant Fitzgerald, or some one else whose name is unknown, without the knowledge, authority, or consent of the plaintiff, prepared a note payable to himself, twelve months after date, at the first national bank at Indianapolis, for the sum of four hundred dollars, with ten per cent. interest from date, to which said note he, without the knowledge, consent, or authority of the plaintiff, affixed his, said plaintiff's, name, thereby making him stand thereon as the maker thereof, and thereupon, as the plaintiff alleges, endorsed said note to said defendant Huston, who is now in the possession thereof and claims to own the same; copies of which note and the indorsement thereon are made a part hereof and appended hereto. And the plaintiff says that he not only did not sign said note or know even of its existence, but owed the said Fitzgerald nothing whatever, and had never promised to give him such note or any note whatever, and had never even talked with him on the subject of giving him a note. And the plaintiff says that said defendant Huston well knows that said note is a forgery; that he has fully explained the same to him and demanded of him a surrender of it or a release of himself from liability on it, but he insists on holding it and using it as a valid, subsisting obligation of the plaintiff. And the plaintiff says the resemblance between his handwriting and that forged is very close; that it might and would be taken to be his by many persons who had seen his writing, and that it would be very difficult, if he were not personally present to testify to the facts and to explain the difference, to show that it was actually a forgery, as it is in point of fact. And the plaintiff says, in view of these facts and of the length of time the note has to run, and the uncertainty as to when the question may be brought up and settled at the instance of the defendant Huston, and the possibility that at that time he, said plaintiff, may be dead, and his estate exposed to injustice and wrong in the collection of said note, he prays the court to decree a cancellation of said note and its deliv-

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ery to him, or that he be decreed to be released from all liability thereon; and will your Honor grant such other relief as may be equitable and just." A copy of the note, payable to the order of Fitzgerald, with the indorsement, corresponding with that described, is set out.

Fitzgerald was notified by publication and made default, but no judgment appears to have been rendered against him. Huston answered by general denial, and on trial there was a verdict for the plaintiff. Over motions by Huston for a new trial and in arrest of judgment, the court pronounced the following judgment. "It is therefore ordered, adjudged, and decreed by the court, that the plaintiff be, and he is hereby released from all obligation and liability on the note mentioned and described in his said complaint, and that the same is hereby declared null and void as to him, the said David S. Roosa, and that he recover of said defendant Huston the costs," etc.

There is no question made here on the motion for a new trial, but it is insisted that the motion in arrest should have prevailed, on the ground that the complaint does not state facts sufficient to constitute a cause of action. The reasons assigned for the motion in arrest were :

"1st. The said complaint does not state facts sufficient to constitute a cause of action against the said defendant.

"2d. The defendant denies the power of the court, and objects to the rendition of judgment against him for the cancellation of the note."

The action was commenced on February 26th, 1870, and the note did not mature until December 15th, of that year.

The cancellation of written instruments, in proper cases, is one of the familiar heads of equity jurisdiction. The abolition, in practice, of the distinction between law and equity does not seem to affect the question arising here. Our courts administer, in every case, either law or equity, in accordance with the legal or equitable rights of the parties. If, according to the principles governing a court of equity, the judgment below is right, it must be affirmed.

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Mr. Justice STORY, after discussing the jurisdiction of a court of equity in such cases, proceeds as follows: "But whatever may have been the doubts or difficulties formerly entertained upon this subject, they seem by the more modern decisions to be fairly put at rest; and the jurisdiction is now maintained in the fullest extent. And these decisions are founded on the true principles of equity jurisprudence, which is not merely remedial, but is also preventive of injustice. If an instrument ought not to be used or enforced, it is against conscience for the party holding it to retain it; since he can only retain it for some sinister purpose. If it is a negotiable instrument, it may be used for a fraudulent or improper purpose, to the injury of a third person. If it is a deed purporting to convey lands or other hereditaments, its existence in an uncanceled state necessarily has a tendency to throw a cloud over the title. If it is a mere written agreement, solemn or otherwise, still, while it exists, it is always liable to be applied to improper purposes; and it may be vexatiously litigated at a distance of time, when the proper evidence to repel the claim may have been lost, or obscured; or when the other party may be disabled from contesting its validity with as much ability and force as he can contest it at the present moment." Story Eq., sec. 700. At sec. 701 the same author says the doctrine is applied to forged instruments, which may be decreed to be given up without any prior trial at law on the point of forgery.

This, it will be seen, is not a case in which the illegality of the instrument appears upon the face of it, but depends upon the extrinsic fact that the plaintiff's name attached to it as maker was a forgery; hence the question does not arise whether a court of equity will interfere in a case where the instrument appears to be void on its face. It is objected that the complaint is bad in this, that as the plaintiff demanded only a surrender of the note, or a release from liability, the defendant was not put in the wrong, and, therefore, that the action cannot be maintained against him. The

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argument is, that the defendant could not be required to surrender the note, because he had a right to retain it, in order to establish his claim against his endorser, and that he could not be required to execute a release to the plaintiff, because that might jeopardize his right to recover from his endorser. But we are of opinion that the complaint would be good if the demand above stated were stricken out. The complaint avers that the defendant well knows the note to be a forgery, that the plaintiff had fully explained that to him, but that the defendant, nevertheless, still persisted in holding and using the note as a subsisting obligation of the plaintiff. Under the averments of the complaint, we think the plaintiff had a right to go into equity for relief without any special demand. The defendant was not obliged to acquiesce in the plaintiff's statement that the note was forged, but if, after he was advised that the plaintiff claimed it to be a forgery, he persisted in holding it be a valid instrument against him, the plaintiff had a complete and perfect right to go into a court of equity for relief against it, and the defendant should take his chances as to the result of the litigation.

The judgment was quite as favorable to the defendant as he could ask. It did not require him to surrender the note to be cancelled, nor that he execute a release to the plaintiff. The note is still left with the defendant, with all his rights unimpaired to proceed against his endorser. The judgment we regard as quite proper under the circumstances. It might have been technically more correct had it adjudged that the plaintiff never was bound by or liable on the note, instead of releasing him from all obligation or liability thereon. But it declares the note null and void as to the plaintiff. This is the substance, and it is sufficient. The most usual decree in such cases is, perhaps, that the instrument be surrendered up and cancelled. But, as before stated, we think the decree entered quite appropriate, inasmuch as it adjudges the note to be null and void as against the plaintiff, yet leaves it in the hands of the defendant,

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whereby he may be the better enabled to enforce whatever rights he may have against Fitzgerald, his endorser. In the case of *Martin v. Graves*, 5 Allen, 601, the court say, in respect to the character of the relief to be granted: "A court of equity will afford relief by directing the instrument to be delivered up and cancelled, or by making any other decree which justice and the rights of the parties may require."

There is no error in the record.

The judgment below is affirmed, with costs.

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43	522
126	384
43	522
126	433

PRACTICE.—*Failure to Demur.—Assignment of Errors.*—A failure to demur to a complaint does not waive the right to call in question the jurisdiction of the court over the subject of the action and the sufficiency of the facts stated in the complaint; but to raise such questions for the first time in the Supreme Court, there must be an assignment of error that the court below did not possess jurisdiction of the subject-matter of the action, and that the complaint does not state facts sufficient to constitute a cause of action.

INSOLVENT DEBTOR.—*Judgment Against.*—An insolvent debtor contemplating an assignment may enter an appearance to a complaint and allow judgment to go, on proof, for a just debt; upon which an execution may issue, under and by virtue of which the goods of the debtor may be seized and sold.

SAME.—*Judgment Creditors of Insolvent Debtor.*—Such judgment creditors have liens prior and paramount to the claims of other creditors who have no judgments, and are entitled to have their judgments paid in full, and cannot, on the application of other creditors, be enjoined from collecting their judgments.

SAME.—Such other creditors cannot, on their application, have a receiver appointed to take possession of and sell the property of the judgment debtor, where it is not shown that there is danger of the judgment debtor's fraudulently disposing of his property.

INJUNCTION.—*In what Cases Granted.*—Injunctions are granted to restrain the commission of acts threatened or anticipated, injurious to the plaintiff, pending litigation, and not where the matter complained of has been consummated either before or after the action is commenced, and before judgment.

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SAME.—Where a debtor is in the open and visible possession of property, and it is not shown that there has been a fraudulent disposition of any of the property, or that the debtor threatens so to dispose of it, there is no cause to restrain the debtor from selling or disposing of the property.

From the Tippecanoe Circuit Court.

H. W. Chase and *J. A. Wilstach*, for appellants.

S. A. Huff, *B. W. Langdon*, and *J. S. Pettit*, for appellees.

BUSKIRK, J.—The facts necessary to an intelligible understanding of the questions arising in the record for our decision are substantially the following :

The complaint was filed May 11th, 1868, by J. and J. Slevin & sons, wholesale dry goods merchants of Cincinnati, against Margaret McGoldrick and husband, G. H. and H. McFadden, Rudolph S. Ford, Joseph Sheern, and Ellen Cox. It contains the following allegations, verified by affidavit of the plaintiffs' agent: That Margaret McGoldrick, formerly McHugh, prior to April 11th, 1864, was engaged in the retail dry goods business in Lafayette, and between that time and November 1st, 1867, when she intermarried with Patrick McGoldrick, she became indebted to the plaintiffs, for merchandise purchased for her business, three thousand nine hundred and sixty-one dollars and eighty-five cents, which was unpaid; that at the time of her marriage she had a stock of merchandise worth eleven thousand dollars, which, with the exception of what she disposed of in the ordinary course of business, was still in her control, and she was still, with the consent of her husband, engaged in trade; that she was indebted to other persons besides the plaintiffs, about eight thousand dollars, all her debts being for merchandise bought for her business, and being for goods then on hand; that she was indebted to defendants, G. H. and H. McFadden on like account, to defendant Joseph Sheern for furniture, to defendant Ford for rent of store, and to defendant Ellen Cox, for services as clerk; that Patrick McGoldrick, the husband, had no means and relied upon his wife's business for his and her support; that the stock of goods was not worth over seventy-five per cent. of

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the debts; that about the 11th of April, 1868, Mrs. McGoldrick was in Cincinnati, where the most of her creditors resided, and proposed to adjust her debts; that she represented her merchandise as worth eleven thousand dollars, the accounts due her at from two thousand five hundred to three thousand dollars, and cash five hundred dollars; that she made an engagement to meet her creditors at 4 P. M., on the 18th of April, but left Cincinnati and returned to Lafayette, and on Monday, the 20th of April, four complaints were filed against her in the Tippecanoe Civil Circuit Court, one in favor of defendants G. H. and H. McFadden, one in favor of defendant Ford, one in favor of defendant Cox, one in favor of defendant Sheern; that said defendants Margaret and Patrick McGoldrick appeared in open court, "and waiving the issuing and service of process upon the said several complaints, suffered and permitted the parties plaintiffs to have judgments entered in said court against her and her husband," for the following sums:

In favor of the McFaddens	—	—	\$276.46
" " Ford	—	—	166.66
" " Sheern	—	—	141.50
" " Cox	—	—	100.00

That executions were immediately issued upon said judgments, at the instance of the attorneys for the several plaintiffs in those suits, who were alleged to be the attorneys for Mrs. McGoldrick in all matters relating to the adjustment of her liabilities; that on the same day on which those judgments were entered, said Margaret procured said attorneys (Chase & Wilstach) to address a letter to the plaintiffs, and like letters to the other creditors, upon the subject of compounding her debts at forty cents on the dollar, on fifteen, twenty, and twenty-five months, with interest, on secured notes; that the whole proceeding, including the taking of said judgments, issuing executions, writing the letter, etc., "was one entire transaction intended for the purpose of fraudulently intimidating the creditors to whom said letter was addressed, so as to induce them to adjust their demands

against the said Margaret on such terms of sacrifice as she might dictate;" that it was ordered as a part of the judgments, that they should be levied of the goods of both or either of the defendants therein; that said Margaret and her husband were attempting by means of said judgments and executions, to perpetrate a fraud upon said J. and J. Slevin & sons, and the other creditors of said Margaret, by not allowing them to have equal access to said stock of goods to pay their debt, which was the only fund for their payment; that there was danger of said stock's "being fraudulently disposed of with the further intent to hinder and delay the plaintiffs and the other creditors; that the conduct of said Margaret and her husband is an attempt to dispose of the said stock with intent to defraud the creditors of said Margaret," etc.; that to prevent such fraud, etc., it was necessary to appoint a receiver, etc., to take the management of the goods and sell the same under the order of the court. Prayer for an injunction against the sale of the goods by McFaddens, Ford, Sheern, and Cox, on their executions, for the appointment of a receiver, to take possession and dispose of the goods as the court should order, for judgment, and other relief. Upon this complaint being filed, the Slevins moved for the appointment of a receiver, and injunction as prayed for in the complaint.

Upon the hearing of the motion, the two affidavits of Margaret McGoldrick and one of John A. Wilstach were filed for the defendants, and one of Mr. Woodward for the plaintiffs.

The affidavit of Mrs. McGoldrick is lengthy, but in substance it states that she had been in Lafayette as a sole trader about four years; that she commenced with about four thousand dollars capital; that in 1864 and 1865 (during the war), her business was profitable; that in 1868 and 1867, she sustained heavy losses from a decline in goods and trade and the failure of her debtors; that in the spring of 1867, she was indebted to the McFaddens four hundred and thirty-three dollars, on account for goods purchased between May

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4th, 1865, and May 9th, 1866; that they, becoming impatient, sent the claim to Chase & Wilstach, attorneys at Lafayette, for collection, whom she afterward employed to assist her in adjusting her affairs; that they presented the claim of the McFaddens June 30th, 1867, and demanded payment; that she explained to them her situation and promised that if they would not molest her with the claim, she would make payments at reasonable intervals thereon; that said attorneys communicated the facts to the McFaddens; that she only was able to pay one hundred and seventy-five dollars on the claim up to February 19th, 1868; that said attorneys made repeated applications for security; denies that she allowed the judgment to be taken in favor of the McFaddens to defraud the other creditors, but because she considered herself honorably bound to do so; states that the claim of Sheern for furniture was just, and that of Ford for rent of the store then in her occupancy, and of Ellen Cox for clerk hire, were wholly unpaid, and that it was necessary to pay Ford to retain possession of the store, and to pay Ellen Cox to retain her services, which were indispensable in business; that she did not intend to intimidate her creditors; that she went to Cincinnati to see her creditors and was there several days and had divers interviews with them for the purpose of arranging their debts; that the creditors presented a paper prepared by their attorney for her to sign, but that being away from home, and having no one to consult with, she asked time and agreed to meet the creditors at the store of M. Loth on Saturday, April 18th, 1868, at 9 A. M., but that being too unwell to meet her engagement promptly, went there at 10 A. M. and found the place closed (they being Israelites), and then went to R. D. Norris & Co.'s store, where she was told there was to be a meeting of her creditors that afternoon at 4 o'clock; denies that she promised to attend it; states that she inquired if the object was to have her sign the paper prepared by the creditors' attorney, and was told that it was, and then she told her informant she should not sign a paper, the legal effect of which

she did not understand, and on which she had no advice; that she returned to Lafayette and consulted with Chase & Wilstach, etc.; that they wrote the letter copied in the complaint upon suggestion of facts made by her; that she did not desire to intimidate her creditors; that her husband exercised no control over the goods; that only fifty-four dollars of addition to the stock had been made since her marriage, and that upon her own credit; that she was honestly holding the goods for the benefit of her creditors and intended applying the proceeds of sales to their debts, and protested against the appointment of a receiver, and states that her husband relied upon his own labor as a carpenter for a living, etc. In a supplemental affidavit, Mrs. McGoldrick states the effect of the contract prepared for her to sign in Cincinnati as she understood it, which she wanted to take to Lafayette for examination, and some facts showing an intention of the creditors to coerce her into measures; also, some details of the proposal for compromise of the debts.

The affidavit of John A. Wilstach states that the judgments of McFaddens, Sheern, Ford, and Cox, had been rendered at the time Woodward, in his affidavit, states "he was informed and believes it to be true that judgments against the defendants Margaret and Patrick * * were not taken," etc.; that is, Wilstach shows that the judgments had been taken when the letter was written by Chase & Wilstach to the various creditors, proposing forty per cent. compromise, while Woodward states that he "was informed and believed" to the contrary.

J. M. Woodward's affidavit shows that he was agent of the Slevins, his examination of Chase & Wilstach's letter book, and his reading of the copy of their letter, which he was informed and believed was before the judgments therein referred to were taken; that Mrs. McGoldrick referred him to Chase & Wilstach as her counsel, etc.

The court upon this complaint and the affidavits enjoined the McFaddens, Ford, Sheern, and Cox from collecting their judgments from Mrs. McGoldrick's property, restrained and

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enjoined her from selling or disposing of her goods or her accounts, and compelled her to deliver over all her property of every kind, including her books and accounts, connected with her business, to Henry Leaming, as a receiver, who gave bond and took the required oath, and who was ordered to appraise and sell the goods at public auction upon notice published in the newspapers, at not less than two-thirds the appraised value, or he could sell at private sale at not less than the full appraised value. Full directions were given to convert all the property into cash and collect all the debts of Mrs. McGoldrick, but she was to be allowed three hundred dollars if she claimed it.

The defendants excepted to each and every "of the foregoing rulings and orders of the court."

At the October term of court for 1868, sundry other creditors, being all but Slevin & Sons, McFaddens, Sheern, Ford, and Cox, made themselves parties plaintiffs, set out their demands, and claimed the benefit of the proceedings and to share the assets realized by the receiver. The parties agreed that the receiver should pay the taxes, but the defendants waived no right thereby. The court then ordered the payment of the taxes.

The receiver reported the appraisal of the goods at seven thousand and fifty dollars and eighty-five cents, and the accounts at two thousand one hundred and eighty-five dollars and three cents; that he had made sales, etc., to the amount of four thousand nine hundred and twenty-eight dollars and thirty-three cents; expenses one thousand one hundred and seventy-four dollars and ninety-three cents.

The defendants filed their several answers as follows:

Joseph Sheern's answer:

1. General denial.

2. As an answer and cross complaint, that on the 20th of April, 1868, he obtained a judgment against said Margaret McGoldrick and Patrick McGoldrick in said Tippecanoe Civil Circuit Court, for one hundred and forty-one dollars and fifty cents then due him, and costs, a copy of which was

set out; that an execution was immediately issued thereon, which was in the sheriff's hands when said receiver was appointed and the goods taken by him and sold under an order of the court; and that he asked the court to order his judgment paid in full out of the money in the receiver's hands.

Defendant R. S. Ford filed a similar answer and cross complaint, setting out his judgment at one hundred and sixty-six dollars and sixty-six cents, and asked similar relief as to its payment out of moneys in receiver's hands.

Defendants McFaddens filed a similar answer and cross complaint, setting out their judgment at two hundred and seventy-six dollars and forty-six cents, and asked the same relief as to the payment out of the moneys in the receiver's hands.

Defendant Ellen Cox having been paid off in full, her answer need not be noticed.

H. W. Chase and J. A. Wilstach were made parties on petition, to assert a mortgage lien on the goods for services, but as they were settled with, the same need not be noticed.

The court ordered that the payments to Ellen Cox and Chase & Wilstach should not affect any of the questions or issues theretofore made.

The defendants Margaret McGoldrick and husband answered, denying all the allegations of the complaint of all the several plaintiffs.

To the several answers and cross complaints of Sheern, Ford, and the McFaddens, the several plaintiffs, who were, under the order of the court, all the parties to the record except the above named defendants, filed their reply in denial.

The cause was then submitted to the court for trial, and a judgment rendered for the several plaintiffs for the amount of their claims as alleged in their several complaints, and for the defendants McFaddens, Sheern, and Ford for the amount of their judgments; that all the indebtedness was for goods,

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etc., had by said Margaret; that her husband was insolvent; that said Margaret was insolvent when the judgments in favor of McFaddens, Sheern, and Ford were rendered, and that said last named judgments were entitled to no preference. The final report of the receiver was approved, and the net proceeds of the whole stock, etc., after payment of expense, was two thousand five hundred and thirty-two dollars and sixty-six cents for distribution, which was ordered, making less than twenty per cent. of the debts. The finding and judgment are very lengthy.

The defendants McGoldricks moved for a new trial on written causes:

1. Because the finding and judgment were contrary to law.
2. That the same were not sustained by the evidence.

The defendants Sheern, Ford, and the McFaddens filed a separate motion for a new trial, setting out the causes:

1. Because the finding and judgment were contrary to law.

2. That the same were not sustained by sufficient evidence.
3. Irregularity in the proceedings of the court, by which the defendants were adjudged to have no preference in the payment of their judgments over the plaintiffs in the case.

The motions were overruled, and exceptions were taken.

The testimony is all set out in a bill of exceptions and shows substantially the following facts:

Margaret McHugh was a sole trader in Lafayette, and purchased merchandise of the plaintiffs to the amount of their bills set out in the various complaints, on the 1st of January, 1868. After the debts were made, she married Patrick McGoldrick, and continued the mercantile business in her own name; in April (prior to the 20th), 1868, being embarrassed, she went to Cincinnati to adjust her liabilities by a compromise with her creditors, but failed to do it. She returned to Lafayette, and on the 20th of April appeared with her husband in open court to complaints in favor of the McFaddens, Sheern, Ford, and Cox; and on trial the court rendered judgments for the amounts justly due them, and

ordered the money to be made out of the property of Margaret and her husband, or either of them. Immediately thereafter, on the same day, Chase & Wilstach, acting as her attorneys as to all matters except the collection of said judgments, wrote to the several creditors the letter copied into the complaint, stating what had been done and proposing a compromise at forty per cent. on secured paper, and urged its acceptance; on the next day executions were issued upon these judgments and placed in the sheriff's hands, and their collection was enjoined by the court as above stated. At the time of allowing the judgments to be taken, said Margaret was indebted to the plaintiffs in this suit about eleven thousand dollars and was in failing circumstances.

The McFadden claim had been in Chase & Wilstach's hands for several months under repeated promises of payment. The judgment of Sheern was for household furniture, that of Ford for rent, and that of Miss Cox for services.

Henry Leaming, receiver, took possession of all Mrs. McGoldrick's assets and converted them into money. The agreement copied in the bill of exceptions shows that the defendants Sheern, Ford, and McFaddens, claimed a priority out of the proceeds of the goods to pay their judgments, and all the defendants insisted that the plaintiffs had no right to proceed by injunction and receiver. The affidavits read on the application for an injunction were also read as evidence, by agreement, and the reports of the receiver were also read in evidence in like manner.

All the rulings of the court against the defendants were objected to, and exceptions taken.

We condense the pleadings, evidence, and rulings of the case into the following brief statement:

Margaret McHugh carried on the retail dry goods business from in 1864 to January 1st, 1868, when she married Patrick McGoldrick, who had no means and never exercised any control over the stock or the business, but the same was managed by Mrs. McGoldrick after her marriage till the property was taken from her by the receiver. The wholesale

house of G. H. & H. McFadden sent their claim for collection to Chase & Wilstach, attorneys, in the summer of 1867, who collected a part and got promises for the residue. In April, 1868, Mrs. McGoldrick owed about eleven thousand dollars to Cincinnati parties for goods, and was unable to pay in full. She went to compromise with them at forty cents and failed to do it, and returned to Lafayette and appeared in court and allowed judgments to be taken in favor of four creditors for goods, rent, and services, justly due, to an amount less than six hundred dollars. The other creditors enjoined her disposal of the goods, and the court put the goods into the hands of a receiver who sold them, and the proceeds were divided *pro rata*, giving each less than twenty per cent. and leaving the balance of the debts unpaid. The defendants who had procured judgments and executions were deprived of their liens upon the goods and compelled to share with the other creditors; exceptions were taken at every step.

Counsel for appellants have discussed the sufficiency of the complaint, but no such question is presented by the record. There was no demurrer to the complaint. The failure to demur does not waive the jurisdiction of the court over the subject of the action or the sufficiency of the facts stated in the complaint; but to raise such a question here, there must be an assignment of error, either that the court below did not possess jurisdiction of the subject-matter of the action, or that the complaint does not state facts sufficient to constitute a cause of action. There is no such assignment of error.

We do not deem it necessary to consider in detail all the errors assigned or questions discussed by counsel, as the examination and decision of three or four questions will be decisive of this case.

The primary and most important question is, whether an insolvent debtor, contemplating an assignment, can confess a judgment in favor of a creditor for a just debt, upon which an execution may issue, and under and by virtue of

which the goods of the debtor may be seized and sold. The precise question was decided by this court in *Lord v. Fisher*, 19 Ind. 7, where it was held that the transfer of a part or all of his property, either directly or by way of confession of a judgment and levy of an execution by a debtor in failing circumstances, for the purpose of paying one debt, leaving many others unpaid or unsecured, if done in good faith, unaffected with any secret trust, is valid, although done in contemplation of, and but a few days before the execution of, a general assignment by the debtor. In that case the court say:

“Naturally, a man has a right to make an honest disposition of his property; that is to say, he may use it to pay an honest debt. It may not be an honest disposition of property to sell it upon a new, and even adequate consideration, if the sale is to keep the property from creditors. It is an honest disposition of a man's property to use it in paying or securing an honest debt. It is a dishonest use of it to pretend to convey it to pay or secure a debt, when, in fact, it is conveyed to be held upon a secret trust for the benefit of the grantor. It is not, in the eyes of the law, necessarily a dishonest use of a man's property to convey all he has to pay or secure one debt, while he leaves many others unpaid, or unsecured. *Chandler v. Caldwell*, 17 Ind. 256. In the case at bar, it is not pretended but that the debt of Doughty and Snyder to Fisher was an honest one; nor is it pretended but that the judgments were confessed according to law, and the executions levied upon the property for the *bona fide* purpose of appropriating it to pay the executions, rather than to be held for the use of Doughty and Snyder. Nor is it denied that the law holds it commendable in a creditor to be diligent in his collections; and it seems that such diligence is all that Fisher has been guilty of. Why, then, is he to be deprived of the benefit of the security which his diligence on the one hand, and the free will of Doughty and Snyder on the other, have given him?” The ruling in the above case was adhered to and followed in the following cases: *Blakemore v. Taber's*

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Ex'r, 22 Ind. 466; *Wilcoxon v. Annesley*, 23 Ind. 285; *Keen v. Preston*, 24 Ind. 395.

It is conceded in the present case that the debts in favor of the McFaddens, Ford, and Sheern, were honest and due at the time the judgments were rendered. Nor is it pretended that the judgments were not rendered according to law, or that the executions were taken out and levied upon the property of Mrs. McGoldrick with the honest purpose of making the judgments. There does not seem to have been any secret trust or private understanding between the parties. The debtor was in failing circumstances, and desired to prefer some of her creditors to the exclusion of others. To accomplish this purpose, the judgments were taken and executions issued and placed in the hands of the sheriff. There was nothing illegal or dishonest in this. The judgments having been rendered upon honest debts and according to law, and executions having been issued and placed in the hands of the sheriff, the judgment creditors acquired a lien on the property which was prior and paramount to the claims of other creditors who had no judgments. In the present case the judgments were not confessed. Regular complaints were filed, to which the defendants entered their appearance. Proof was heard by the court, and judgment was rendered in each case upon such proof, and not by confession. The judgment creditors, having acquired prior liens, were entitled to have their judgments paid in full. It is, therefore, manifest that the court erred in its final decree in providing that such judgment creditors should share *pro rata* in the distribution of the proceeds of the sale of the property of the judgment debtors.

We proceed to inquire whether the court erred in granting an injunction. The injunction was two-fold in its character. First. It enjoined the McFaddens, Ford, and Sheern from collecting their judgments by the levy upon and sale of the property of the judgment defendants. Second. It enjoined Mrs. McGoldrick and her husband from selling or disposing of their property.

There is no principle upon which the injunction against McFaddens, Ford, and Sheern can be sustained. They had obtained valid judgments, upon which executions had issued and been placed in the hands of the sheriff. These proceedings gave them a lien upon all the property of the judgment defendants, which was subject to such executions, and this lien was prior and paramount to the claims of the plaintiffs in this action. The court possessed no power to enjoin them from having their executions levied. It is also insisted by counsel for appellants that a creditor who has not reduced his claim to a judgment has no right to enjoin judgment creditors, although the judgments may have been fraudulent. We do not deem it necessary to decide anything on this point, as the injunction was improperly granted for the reason already stated, but refer to some authorities on the point. *Reubens v. Joel*, 13 N. Y. 488; *Roraback v. Stebbins*, 40 N. Y. 62.

It is provided by section 137 of the code, 2 G. & H. 132, that, "when, during the litigation, it appears that the defendant is doing, or threatens, or is about to do, or is procuring or suffering some act to be done, in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual," or "where it appears in the complaint, at the commencement of the action, or during the pendency thereof, by affidavit that the defendant threatens, or is about to remove, or dispose of his property, with intent to defraud his creditors, a temporary injunction may be granted to restrain the removal or disposition of his property."

The allegations of the complaint do not bring this case within the cases provided for in the above section of the code, and the allegations made are not supported by the affidavits in the record. The injunction was asked upon the grounds that the debtors had been guilty of a fraud in permitting judgments to be taken against them, and that Mrs. McGoldrick had acted in bad faith in not keeping her appointment to meet her creditors in Cincinnati. As

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we have seen, the judgments were not fraudulent, but were valid. But injunctions are granted to restrain the commission of acts threatened or anticipated, injurious to the plaintiff, pending the litigation, and not where the act complained of has been consummated either before or after the action is commenced, and before judgment. *Reubens v. Joel, supra*. The failure of Mrs. McGoldrick, under the circumstances shown in the affidavits, to meet her creditors can not be tortured into a cause of injunction. There is an apprehension expressed in a very general and indefinite way in the complaint, that, unless restrained, Mrs. McGoldrick and her husband will dispose of their property, but this apprehension is not supported by a statement of facts showing that acts had been done or were threatened to be done, looking toward a fraudulent disposition of their property. The apprehension was based upon the rendition of the judgments and the failure of Mrs. McGoldrick to meet her creditors.

The defendants were in the open and visible possession of the stock of goods. There was no evidence showing, or even tending to show, that they had fraudulently disposed of any of their property, or that they threatened so to do. The courts were open to the plaintiffs to obtain judgments on their claims, and if, during such litigation, the defendants, either disposed of or threatened to dispose of their property to defraud their creditors, the plaintiffs might have resorted to the proceeding by attachment. There was no cause shown for an injunction.

Did the court err in appointing a receiver?

Having held that the judgments in favor of McFaddens, Ford, and Sheern were legal; that the executions issued thereon and in the hands of the sheriff created a lien upon the property of the judgment defendants; that the injunction was improperly granted, because it was not shown that there was danger of the defendants fraudulently disposing of their property; it seems to result logically and irresistibly that there was no ground for appointing a receiver. Mrs. McGoldrick had done nothing, nor did it appear that she

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threatened or was about to do anything, which would forfeit her right to the possession and disposition of her own property. It is provided by the third subdivision of sec. 199 of the code, 2 G. & H. 152, that a receiver may be appointed in a case like this, where it is shown that the property, fund, or rents and profits in controversy are in danger of being lost, removed, or materially injured. There was no such showing in this case.

It is very obvious to us that McFaddens, Ford, and Sheern, having acquired a prior and paramount lien upon the property of the judgment debtors, were entitled to have their judgments paid in full, and that the court erred in its final judgment in requiring them to share *pro rata* with the other creditors, in the distribution of the money paid into court.

The judgments rendered in favor of Slevins & Sons and the other plaintiffs, and against Mrs. McGoldrick and her husband, seem to have been based upon just claims, and are affirmed.

The judgment is reversed, with costs; and the cause is remanded, for further proceedings in accordance with this opinion.

HOUGLAND ET AL. v. THE STATE, EX REL. MCCOOL.

REPLEVIN BAIL.—*Attestation by Justice of the Peace.*—An undertaking of replevin bail upon a judgment rendered by a justice of the peace is void, if not attested by the justice. DOWNEY, C. J., dissented.

CONSTABLE.—*Suit on Bond.*—In a suit upon the bond of a constable, where the only breach alleged is a failure to levy upon the property of the replevin bail, if the undertaking of replevin bail be void, there can be no recovery.

From the Warrick Common Pleas.

A. Iglehart and *J. E. Iglehart*, for appellants.

I. S. Moore, for appellee.

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BUSKIRK, J.—The facts necessary to a proper understanding of the questions involved are these :

On the 6th day of December, 1868, McCool, the appellee, held a note against John L. Boner and William Boner as principals, and Thomas J. Hudspeth as surety, which was long past due, and William Boner had been dead for more than a year. Notwithstanding these facts, he, on that day, obtained a judgment before Peter Seigel, justice of the peace, as upon the service of process, for the amount of the note and interest, less than two hundred dollars, against all the makers of the note.

Shortly after the rendition of this judgment, Washington M. Boner (sometimes in the record described as "Washington N." and sometimes as "Wash") became replevin bail, according to the form of the statute, excepting that the name of the justice nowhere appears as attesting the bail. At the expiration of the stay, to wit, on the 22d day of June, 1869, an execution issued against all the judgment defendants, and against the replevin bail, in the alternative, in due form. On the 28th day of July, 1869, Hudspeth filed in the court of common pleas of Warrick county a complaint for an injunction, setting forth that William Boner was dead before the rendition of the judgment; that McCool, without the consent of the plaintiff, had given time to John L. Boner, for a consideration, until John L. had become insolvent, and alleging that the judgment was rendered against plaintiff without service of process, and praying an injunction. Upon the filing of this complaint, a temporary restraining order was granted, and at the October term, 1869, a perpetual injunction was rendered. Upon the default of the defendants, and after enjoining McCool and the justice, the decree reads, "and that Ben. Hougland be forever barred and inhibited from collecting an execution on said judgment."

Pending the injunction proceedings, Washington M. Boner had sufficient property to pay the execution, but whether

he ever had any more, or whether he had enough to pay it after the injunction, we think the record does not show.

Hougland failed to make the money upon the execution, and then suit was brought upon the constable's bond to recover the same. The suit was brought before a justice, where there was a judgment for the defendants, from which an appeal was taken to the circuit court.

There were three breaches of the bond filed, but two were withdrawn. The one left simply counts upon a failure to levy the execution upon the property of Wash Boner. And under this assignment proof is made, showing that while the execution was in the hands of Hougland, Wash Boner had property sufficient to satisfy the execution. Upon this the plaintiff claimed a right to recover the whole judgment, costs, and statutory damages.

On the other hand, the defendants insisted, 1st. That the replevin bail was void, and, therefore, the execution void. 2d. That the perpetual injunction of Hudspeth against collecting the judgment from him, even if the injunction is not broader, released the replevin bail, he having become the surety of Hudspeth as well as the others. And, 3d. That if McCool could collect anything, it would be only nominal damages, as the constable could not levy pending the injunction suit, and as Wash Boner was not shown to have any property after the term of the court at which the case was determined.

To sustain this view, the defendants put in evidence the record in the case of *Hudspeth v. McCool*, and proved the death of William Boner and the insolvency of John L. before the judgment; also, that Hudspeth is a man worth twenty-five thousand dollars or more, and that Wash Boner replevied the judgment for Boner and Hudspeth.

But the court found for the plaintiff, and assessed the damages at the full amount of execution, with ten per cent. damages thereon.

The defendants moved the court for a new trial, for the reasons, 1st, 2d, and 5th. The damages are excessive.

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3d. The finding of the court is not sustained by sufficient evidence. 4th. The finding is contrary to law. But the court overruled the motion, and rendered final judgment. The proper exceptions were taken to the rulings upon which error is assigned.

The first and third assignments of errors are merely formal; the second, the overruling of the motion for a new trial, is relied upon solely.

Five questions arise upon the record here: 1st. Is the replevin bail, upon which the alleged liability of Wash. M. Boner upon the judgment against William Boner, John L. Boner, and Thomas J. Hudspeth is based, void, for want of the attestation of the justice of the entry of bail, in conformity with the terms of the statute? 2d. Admitting the entry of replevin bail to have been sufficient in the first instance, did not the fact that the judgment was void, for want of service of process or appearance of Hudspeth, as to him, alleged so by Hudspeth, and the allegation admitted by McCool by his default, also render the undertaking of the replevin bail void? 3d. Was not the replevin bail discharged by the injunction? 4th. Was not appellant Hougland, the constable, enjoined from the collection of the judgment upon execution? And, 5th. If the appellee was entitled to recover anything, did not the evidence confine his recovery to nominal damages.

Before proceeding to consider the questions stated, we will dispose of a question raised by counsel for appellee, and which is stated by counsel as follows:

“The first proposition is, that ‘the entry or undertaking (of replevin bail), not being in substantial conformity with the statute, is void.’ We submit that the question is not properly before the court, and ought not to be considered, because the proper objection was not made in the court below to the admission of the entry in evidence. The record shows that the justice’s judgment, and the entry of replevin bail thereon, were read in evidence, as set out in the record, without objection. After showing such admis-

sion of the entry the record proceeds: 'And the plaintiff also read in evidence, by order of the court, over defendants' objection and exception, the entry of replevin bail by Washington M. Boner.' To what did appellants' objection relate? If to reading the entry in evidence the second time, surely the error, if error at all, was a harmless one. Concede, however, that the objection related to the admission of the entry in evidence in the first instance, then we say the objection was not well taken, for the reason that the grounds upon which it was based were not pointed out to the court at the time. *Clem v. Martin*, 34 Ind. 341, and the authorities there cited. We quote from the case in 34 Ind.: 'The objections must be pointed out and the attention of the court specially called to them at the time. The judge in the midst of a trial cannot be expected to delay the trial to hunt up the objections.' But there is a much stronger reason why this court will not review the action of the lower court on that point. Appellants did not embrace the ruling of the court complained of in their causes for a new trial. *The State, ex rel. Biddinger, v. Manly*, 15 Ind. 8; *Kent v. Lawson*, 12 Ind. 675; *Rosenbaum v. McThomas*, 34 Ind. 331. Having failed to do so, they waived the objection they may have desired to reserve. 12 Ind. and 34 Ind., *supra*."

It seems to us that the learned counsel for appellee has misconceived the point relied upon by counsel for appellants. The appellants do not insist that the court erred in admitting in evidence the transcript of the judgment and the entry of replevin bail, but that, conceding that the evidence is properly in the record, the court erred in overruling the motion for a new trial, because such evidence shows that the entry of replevin bail was void for the want of the attestation of the justice of the peace. The point relied upon by counsel for appellant is, that there was such a failure of proof as required the granting of a new trial. We think that question is presented by the third reason for a new trial and the assignment of error, that the court erred in overruling the

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motion for a new trial. It will be observed that the admission in evidence of the transcript of the justice was not assigned as a reason for a new trial, and consequently can not be assigned for error here. The breach of the bond assigned and relied upon is, that the officer failed to make the judgment by the levy and sale of the property of the replevin bail. If the entry of the replevin bail was void for want of the attestation of the justice, or if the replevin bail was subsequently discharged, or if the constable was properly and legally enjoined from levying upon the property of such replevin bail until after he had become insolvent, it is manifest that there could be no recovery upon the bond of the officer for the breach assigned. The first and most important question arising in the record is, did Washington M. Boner become legally bound as replevin bail? It is not denied that Boner signed his name to the docket and acknowledged himself replevin bail, but it is contended that the attestation of the justice of the peace was necessary to the validity of such undertaking.

The statute, 2 G. & H. 602, sec. 84, provides, that the undertaking shall be substantially in the following form :

"I, A—— B——, hereby acknowledge myself replevin bail for the stay of execution, on the above judgment for——days from the rendition thereof. Witness my hand, this——day of——, 18——.

"A—— B——.

"Test: E—— F——, J. P."

The following argument is made, on this point, by counsel for appellants :

"The undertaking in the case under consideration lacks the attestation of the justice. The question then is, is this attestation form or substance? We answer, substance. The undertaking by the same section becomes a judgment confessed, and execution issues upon it jointly with the judgment of defendants. This being true, the attestation of the justice is equivalent to his signature to his judgments, required by section 58 of the same act. There it is simply

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required that the judgment be 'entered and signed,' etc. Under this section, this court held, in *Ringle v. Weston*, 23 Ind. 588, that a justice's judgment, not signed by the justice, is void. So we see, in the one case, the section requires that a judgment shall be rendered and signed by the justice; and in the other, that an undertaking signed by the bail and attested by the justice shall have the effect of a judgment confessed.

"In the one case, this court holds that the absence of the signature renders it void; and certainly, *a fortiori*, if the signature is wanting in the other, it is equally void.

"The substantial points of the entry of bail are these: 1st. The acknowledgment of liability by the replevin bail. 2d. His signature, which serves as a binding obligation on his part. 3d. The attestation of the undertaking by the justice, that it may have the force of his official sanction as a record, 'a judgment confessed,' in the language of the statute.

"We are aware that it will be assumed that this provision is directory, the omission formal, and the objection technical.

"But this objection is fully met in *Galbraith v. Sidener*, 28 Ind. 142, wherein the effect of the failure to sign the record by the judge of the court of common pleas is discussed, and *Ringle v. Weston* is commented on and approved. But the case of *Cox v. Crippen*, 13 Mich. 502, is a case precisely in point, the statute being almost identical with ours. The case is ably argued by counsel, and briefs of points and authorities printed in the report of the case, and the question presented here is discussed by Judge COOLEY, with his acknowledged ability, and he reaches the conclusion, that the attestation is not merely formal, but is substantial; that the statute is not directory, merely, but peremptory; and that therefore the attestation and certificate are indispensable to the validity of the undertaking, and that their omission is fatal and the undertaking void.

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"We leave this opinion without further comment, simply asking the court to examine the opinion of the court in that case, before deciding this. We adopt the argument of the opinion.

"Of course, if the undertaking was void, the execution issued was void as to the replevin bail, and the breaches assigned upon the constable's bond are not well assigned; or, more accurately speaking, they are not sustained by the evidence."

We have examined the case of *Cox v. Crippen*, *supra*, and find that it was under a statute "almost identical with ours." The case is directly in point. The court holds that the requirement of the statute, which makes it the duty of the justice to attest the replevin bail, is not directory merely, but peremptory and mandatory. The court say:

"It will be seen, on examination of the statute, that when this undertaking is entered upon the docket in due form, it is somewhat in the nature of a confession of judgment, and has the force and effect of a judgment without any other form or ceremony whatever. There is nothing in the statute which requires any intervention on the part of the justice in taking the stay, or which demands that it be in his presence, or be brought to his knowledge, unless the section quoted makes it necessary for him to attest the signature. He is not required to approve or accept it, if it is satisfactory to the judgment creditor; and as the docket of a justice is a public record, at all times open for proper entries, the parties to the judgment might enter the security in the absence, and without the knowledge, of the justice, as properly as in his presence, if his intervention is not required. No proof that the justice was actually present when this security was entered into can have any bearing, since, if he was required by law to attest it, his presence could not be regarded as a legal equivalent for attestation, and if not required to do so, it was wholly immaterial whether he was present or not.

"The consequences of a conclusion that the security need not be witnessed are so serious that we can not avoid

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believing the Legislature regarded that act as something more than an idle ceremony. As the entry of the security has the force and effect of a judgment, a justice might be called upon to issue execution upon an instrument, of the genuineness of which he knew nothing, but where he would be required at his peril to take notice of the real facts, when they might be within the knowledge of a single person only, and that person unknown to him. Not only would the justice be thus placed in peril, but a false and forged instrument would at once, from the simple fact of being placed upon the docket, take upon itself the semblance of a judgment upon which officers would be required to act, so that a party might find his property seized in execution before he was aware of a claim.

“A statute under which such consequences could follow, or which should permit judgment to be taken without the intervention of any judicial officer, would be an anomaly. Judgments have never been allowed to be taken against parties upon their own confessions, or in any manner, except in pursuance of forms designed to afford complete protection against frauds or mistakes.”

The reasoning of the court in the above case is sound and cogent. It seems to us that the undertaking of the replevin bail in the case in judgment was void for the want of the attestation of the justice. Inasmuch as the only breach of the bond relied upon was for the failure of the constable to levy upon the property of the replevin bail, it necessarily results, that there can be no recovery in this case on the evidence in the record. It is, therefore, unnecessary for us to examine the other questions discussed by counsel.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to grant a new trial, and for further proceedings in accordance with this opinion.

DOWNEY, C. J.—I regret that I can not assent to the opinion agreed upon by the majority of the court in this

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case, so far as it holds the recognizance of replevin bail invalid, because it is not formally tested by the justice of the peace on whose docket it was entered. The statute authorizing the stay of execution is set out in the above opinion of the court. The judgment defendant is entitled to the stay, by entering replevin bail on the docket of the justice in substantially the form prescribed. The entry is not required to be made in the form prescribed, but only substantially in that form. The act to be done, to entitle the defendant to the stay, is an act which he is to do, by the "judgment defendant" "entering replevin bail." If the defendant and his bail shall go to the justice of the peace, and the defendant, the bail, the justice, or any one else shall write out the recognizance on the docket, and the bail shall sign it, can there be any substantial reason why this shall not be valid? The judgment defendant, the bail, and the justice intended that it should be a valid recognizance of replevin bail, and it contains all that the language of the section requires, unless it be the word "test," and the name and official designation of the justice of the peace by the use of the word "justice." The majority of the court decide this point mainly on the authority of *Cox v. Crippen*, 13 Mich. 502. I think that case ought not to be followed. It throws away the substance for a mere form, without any sufficient reason for so doing. In that case the recognizance had been entered and signed by the bail in exact conformity to the statutory form, and the justice of the peace had written following it, "I approve of Warren S. Crippen as stay. B. Bennett, J. P." This was held by that learned and reputable tribunal as not being equivalent to the word "test," and for the want of a formal attestation by the justice of the peace, the recognizance of replevin bail was held invalid. One would suppose that very substantial and forcible reasons would have to be shown for thus setting aside an act so completely in substantial conformity to the statute. But what are the reasons? The court talks about serious consequences flowing from allow-

ing such an act to be treated as binding and valid. The justice of the peace, the court says, might be called upon to issue an execution on the recognizance of replevin bail, "of the genuineness of which he knew nothing, but when he would be required at his peril to take notice of the real facts, when they might be within the knowledge of a single person only, and that person unknown to him. Not only would the justice be thus placed in peril, but a false and forged instrument would at once, from the simple fact of being placed upon the docket, take upon itself the semblance of a judgment upon which officers would be required to act, so that a party might find his property seized in execution before he was aware of a claim." This whole argument, and the whole ground of the fears of the serious consequences to result from sustaining a recognizance of replevin bail not tested by the justice of the peace in due form, grows out of the supposition that some one will forge an entry of replevin bail on the docket of the justice of the peace. If that shall not be done, then none of the dreaded consequences will follow. I suggest that a position which rests only upon the supposition that some one will forge a recognizance of replevin bail can not be very well founded. Even this objection to such a practice would seem to have had no foundation in the Michigan case, any more than in the case under consideration; since there the justice of the peace, under his own hand, approved the entry of bail. But that court suppose that "a party might find his property seized in execution before he was aware of a claim." If this should happen, which could never be the case until some one had first forged an entry of replevin bail against the party, it is not perceived that there could be any great difficulty in the case.

I am confirmed in my opinion that the formal testing of the entry by the justice is not of the substance of the transaction, from the fact that no such formality is required in the entry of replevin bail in the higher courts of record in this State. By reference to sec. 421, p. 234, 2 G. & H., it will

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be seen that the clerk is required to take and approve the bail, but no entry of the fact of approval or any testing of it is required of him. The statute simply requires that "the recognizance shall be written immediately following the entry of the judgment, and signed by the bail." And by reference to sec. 424, on the succeeding page, it will be found that in cases where a stay of execution may be had, after the execution has issued, it is done "by putting in bail to be approved by the sheriff, and indorsed thereon, and signed by the bail." It is urged that as the statute requires the justice of the peace to sign his judgment, this is a reason why he should attest the entry of bail. I think differently. There is no one but the justice to sign the judgment. Judgments in the higher courts are required to be read and signed in open court, and yet the recognizance of replevin bail of such judgments need not be attested, or signed by any one except the bail. Ought it to be presumed that the legislature would have been so careful as to have the entry authenticated by the testing of it by the justice of the peace to make it valid, when entered before him in cases of small import, and yet wholly omit any such formality when the bail is entered in the clerk's office, where the amounts are generally so much greater? If there is danger of forgery from the lack of a formal attestation, by the clerk, of the entry, there would seem to be an open field. If the clerk is to be embarrassed when he comes to issue an execution against the bail for want of a formal testing by him of the entry, the floodgate is here left wide open. If there is danger that some one's property may be seized in execution before he has had any notice of the claim, numerous instances of such seizure might be expected to occur. But who has ever heard of any of these forgeries, embarrassments, and seizures, from any such cause? It is stated in the opinion of the majority of the court, and shown by the record, that it was not denied that Boner signed his name to the docket and acknowledged himself replevin bail, but it was contended that this formal attestation was essential to make

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it valid. This shows that, in this case, there is no uncertainty as to the recognizance having been entered into by the bail, no danger of any forgery, no embarrassment in issuing the execution, and no danger of the property of Boner being seized before he has any notice of a claim against him. I cannot agree to a construction of the section in question which will have the effect in this case, as in almost all others, as I am persuaded, to release a man from an obligation into which he has solemnly entered with a full knowledge of the liability which he was assuming, and where every consideration of justice and proper interpretation of the law requires that he should be held liable.

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SUPREME COURT.—*Assignment of Error*.—Where the overruling of a motion for a new trial is not assigned as error, the Supreme Court will not consider any error properly constituting a cause for a new trial.

From the Marion Circuit Court.

W. Morrow and *N. Trusler*, for appellant.

E. T. Johnson, for appellee.

DOWNEY, C. J.—There are no questions presented by the assignment of errors in this case, except such as should have been stated as reasons for a new trial. The overruling of the motion for a new trial is not assigned as error. The case is like the case of *Cole v. Burris*, 38 Ind. 168; and for the reasons there stated the judgment must be affirmed. See *Tyner v. Adams*, 34 Ind. 401.

Judgment affirmed, with five per cent. damages and costs.

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HANSON v. THE STATE.

LIQUOR LAW.—Sale to Minor by Bar-Tender.—Where a bar-tender in charge of a saloon, in the absence of the proprietor, who had a license or permit, and without his knowledge, sold liquor to a minor;

Held, that the proprietor was not liable for a violation of section six of the act relating to the sale of intoxicating liquors, Acts 1873, p. 154.

From the Marion Criminal Circuit Court.

W. W. Leathers and *G. H. Campbell*, for appellant.

R. P. Parker, *H. Lee*, *J. B. Elam*, and *J. C. Denny*, Attorney General, for the State.

DOWNEY, C. J.—This was an indictment against the appellant, charging that on the 7th day of June, 1873, at, etc., he did unlawfully sell to Edward Coval, who was then and there a person under the age of twenty-one years, one pint of intoxicating liquors, contrary, etc. On arraignment, the defendant pleaded not guilty. The issue was tried by the court, and there was a finding against the defendant. He moved for a new trial, on account of the insufficiency of the evidence. His motion was overruled, and sentence was pronounced against him. The error assigned is, among others, the overruling of the motion for a new trial. The sixth section of the act relating to intoxicating liquors, Acts 1873, p. 154, is as follows: "It shall be unlawful for any person, by himself, or agent, to sell, barter, or give intoxicating liquors to any minor, or to any person intoxicated, or to any person who is in the habit of getting intoxicated." By the fourteenth section of the act, the punishment for violating the sixth section of the act is a fine of not less than ten nor more than fifty dollars, or imprisonment in the county jail not less than ten nor more than thirty days.

The evidence in the case that we are considering, which was that of the person who purchased the liquor, shows that he was under twenty-one years of age at the time of the trial; that on the 7th day of June, 1873, in Marion county, Indiana, and in the city of Indianapolis, he went into the

saloon of the defendant, where liquors were sold, with two other persons, who were adults, and requested of the defendant's bar-keeper and agent, in the absence of the defendant, to furnish him a cigar and the other two persons whiskey; that the cigar and whiskey were furnished as requested; that the two persons with him drank the whiskey so furnished, but he did not drink any of it, or any other intoxicating liquor, but paid the defendant's bar-tender for the cigar, which he smoked, and for the whiskey drank by the other two persons.

It is claimed by counsel for the appellant, that this evidence is insufficient in two essential particulars: 1st. That the sale was made in the absence of the appellant, and, so far as the evidence shows, without his knowledge; and, 2d. That the witness did not purchase any intoxicating liquor to drink himself, which was essential to a conviction.

Perhaps it may be fairly inferred from the evidence that the appellant had a license or permit to sell liquors. It is shown that the place was a saloon where liquors were sold, and there was a bar-keeper there. Assuming, then, that the defendant was lawfully engaged in the business of retailing intoxicating liquors, that the bar-tender was his agent, and, in the absence and without the knowledge of the defendant, sold the liquor to the minor, the first question is, does this show a violation of section six by the defendant? The section on which the indictment is founded makes it penal if the defendant, by himself or his agent, sold to the minor. But can we presume that the defendant, when he left the bar-tender in charge of the bar, made him his agent to sell to a minor, an act which would be in violation of law? There is no evidence that he authorized any such sale. If that fact can be found, it must result as an inference from the fact that the bar-tender was left in charge of the bar. We think that no such inference, from that fact alone, can arise. If it had been shown that the defendant had authorized and instructed his bar-keeper to sell to the infant in question, or to infants generally, or if he had been pres-

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ent authorizing or assenting to the sale to the minor, the case would be different. As the evidence does not show that the bar-tender was the agent of the defendant to make the sale in question, we think that, on this point in the case, it was not sufficient to justify the finding of the court. We need not decide what would have been the case had the indictment been against the bar-keeper who sold the liquor. In *Lauer v. The State*, 24 Ind. 131, a case involving this question, it was said: "But the cases must be reversed, because there was nothing in the evidence from which the inference could be drawn that the defendant either did the acts charged in the indictment, or that they were done by his authority or consent, express or implied, or even with his knowledge. We must not hold men responsible for crimes committed by others, without some proof that they either procured, counselled, or advised their perpetration. We know full well that in this class of cases the guilty may sometimes escape for a failure of this proof, and that it may sometimes be impossible to produce it in cases where it exists. But these considerations are also applicable to every other class of crimes. The guilty frequently go unpunished for lack of proof, but this is better than that the innocent shall be punished as well as the guilty. The law upon this subject is well settled. It was ruled in this State as early as 1831, in *Pennybaker v. The State*, 2 Blackf. 484, and this was confirmed in *Hipp v. The State*, 5 Blackf. 149. If there had been evidence that on other occasions the bar-keeper had sold to infants, with the defendant's knowledge, and that the latter made no objection, or still continued him in his employ, and the jury had inferred therefrom that he did so by the defendant's authority, we would not be authorized to interfere." It is doubtful whether the fact that the section in question expressly makes a sale by the agent criminal, as well as one made by the defendant himself, creates any material difference between this section and the sections in former laws on the subject, since it was held under such former laws that the vendor might be convicted, if it appeared

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that the sale was made by him through his agent, it appearing that the particular sale was authorized by him. One who sells intoxicating liquor by his agent, duly authorized thereto, must be regarded as selling it himself. *Molihan v. The State*, 30 Ind. 266.

The other ground taken against the conviction in this case raises the question whether, if a minor purchase liquor, not to be drank by himself, but by others who are adults, the person selling to him is guilty of a violation of section six. That the selling in such a case is within the letter of the section is clear enough. But the question is, is it within the mischief against which it was intended to guard? Laws are not to be literally construed when such a construction will carry them beyond the legislative intention. As it is not necessary in this case that we should decide this question, we leave it undecided.

The judgment is reversed, and the cause remanded, with instructions to grant a new trial.

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PRACTICE.—*Interrogatories to Jury.*—The statute authorizes the propounding of interrogatories to be answered by the jury, only where there is to be a general verdict.

SAME.—*Special Verdict.*—Either party may demand a special verdict, and when demanded, the jury are to find the facts only, leaving judgment thereon to the court. In such case, it is the right of each party to draw up in proper form, to be submitted to the jury, a statement of such facts as he conceives the evidence establishes. The jury may adopt either the one or the other, if in their judgment the evidence justifies it, or they may adopt either the one or the other in part and reject part, as the evidence may require, or they may reject both and make a statement of facts which they find to have been proved.

SAME.—Where a special verdict is demanded, and the parties do not object to the propounding of interrogatories covering the material facts in the case, but assume that such is the correct practice, by preparing and submitting inter-

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rogatories, they may be deemed to have waived the finding of a special verdict in the usual form.

SAME.—*Interrogatories to Jury.*—Where interrogatories are propounded to a jury, which involve a finding of facts material to a correct decision of the cause, the answers must be positive and certain. Answers expressing only the inclination of the minds of the jury, as to say, “we think not,” etc., are insufficient and too uncertain to base a judgment upon.

From the Putnam Circuit Court.

S. Claypool and *L. P. Chapin*, for appellants.

D. E. Williamson and *A. Daggy*, for appellees.

WORDEN, J.—This was an action by Melissa Stanley and David, her husband, against Mary A. Hopkins and James Hopkins, her husband, to recover possession of certain real estate described.

The defendants filed a cross complaint against the plaintiffs and John S. Jennings, alleging, in substance, that Mrs. Hopkins had purchased the property in controversy from Jennings, and had taken a bond from him for the conveyance of the property when the purchase-money should be paid; that Jennings had put her in possession of the property, and that she had made large and valuable improvements thereon; and that afterward, and while she was thus in possession, Jennings had conveyed the property to the plaintiff Mrs. Stanley, the latter having full notice of the rights of Mrs. Hopkins therein. That most of the purchase-money has been paid by Mrs. Hopkins to Jennings, and there is an offer to pay the residue. Prayer for specific performance and other relief. To the cross complaint a general denial was filed, with an agreement that under it all parties might give in evidence any and all matters in the same manner as if specially set up in answers or replies.

The cause was submitted to a jury for trial, and at the proper time Mrs. Hopkins demanded a special verdict. With a view to such special verdict she prepared certain questions or interrogatories and asked the court to propound them to the jury to be by that body answered. The court did not propound to the jury all the questions embraced in Mrs.

Hopkins' request, but did propound forty questions, which, together with the answers of the jury thereto, we append.

1st. Was, or was not, John S. Jennings the owner in fee simple of the land now in issue, on the 5th day of April, 1859, or when the bond hereafter referred to was executed? Ans. Yes.

2d. Did, or did not, said Jennings execute a title bond to said Mary A. Hopkins for the conveyance of said land? Ans. Yes.

3d. When was that bond, if any, executed? Ans. 1859.

4th. What did said bond, if anything, obligate said Jennings to do, and when? Ans. Make her a deed six years after date, if purchase-money had all been paid.

5th. What was the price required by said bond, if any, to be paid for said land? Ans. About fifteen hundred dollars.

6th. When was said price to be paid? Ans. Six years after date of bond.

7th. Has, or has not, said purchase-money been paid? Ans. Yes; paid in settlement.

8th. How much, if any, has been paid? Ans. Something over six thousand dollars.

9th. At what time or times was it paid, if any was paid? Ans. About the year 1865.

10th. How much, if any, of said money remains unpaid? Ans. None.

11th. Did or did not said Mary A. Hopkins take possession of said land under said bond with the consent of said Jennings? Ans. Yes.

12th. Did or did not said M. A. Hopkins make improvements on said land? Ans. Yes.

13th. What improvements, if any, did she make? Ans. House, and all the improvements on said land.

14th. What is the value of said improvements, if any? Ans. About six thousand dollars.

15th. Did or did not said bond afterward, or about October, 1864, go into the hands of said Jennings? Ans. Yes.

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16th. If so, then for what purpose? Ans. As collateral security.

17th. Was or was it not done with the knowledge and consent of said M. A. Hopkins? Ans. Yes.

18th. Did or did not said Jennings afterward convey said land to said Melissa Stanley? Ans. Yes.

19th. If so, about what date was the conveyance made? Ans. About August, 1869.

20th. Was or was not said M. A. Hopkins then in possession of same? Ans. Yes.

21st. How long, if at all, had she been in possession? Ans. Since 1859.

22d. Had or had not said Mrs. Stanley notice of any claim of said Mrs. Hopkins to said property at the time of the conveyance to Mrs. Stanley. Ans. Yes.

23d. If so, what was that claim? Ans. About ninety dollars paid by Orvil Earl for taxes, and twenty dollars for moving.

24th. How much, if any, did Mrs. Hopkins herself pay upon said land and improvements? Ans. One gold watch valued at seventy-five dollars.

25th. How much, if anything, did her son Orvil Earl pay for her on same? Ans. About fifteen hundred dollars.

26th. What in value of improvements did he make on said land for her? Ans. About one hundred and fifty dollars.

27th. Did or did not Mrs. Hopkins invest any of her own money or property in making said improvements? Ans. Yes.

28th. If so, how much? Ans. About seventy-five dollars.

29th. If said bond came into the hands of said Jennings as a collateral security, did it ever again pass from his hands into the possession of Mrs. Hopkins? Ans. We think not.

30th. Was or was not said bond ever surrendered to said Jennings and cancelled? Ans. It was.

31st. If so, when was it done? Ans. August 1st, 1865, at the time the settlement was made.

32d. Was or was it not done, if at all, with the knowledge and consent of Mrs. Hopkins? Ans. We think it was.

33d. If said bond was ever surrendered to said Jennings and cancelled by Mrs. Hopkins, did she do it in writing, by joining with her husband, or by her separate endorsement? Ans. By her separate endorsement.

34th. If said bond was ever surrendered to said Jennings by Mrs. Hopkins, was or was not the ownership of the land and property surrendered to him unconditionally, or was it done for the purpose of allowing him to sell the property to satisfy debts due him and then account for the excess to her and her husband? Ans. To sell and account to them all over the agreed price.

35th. Did or did not Mrs. Hopkins agree with said Jennings that if he permitted her to remain in possession of said property, she would surrender the possession peaceably at the end of the term agreed upon? Ans. Yes.

36th. Did or did not Mrs. Hopkins state to plaintiffs, just before their purchase of said property, that the title was all right and clear in Jennings? Ans. We think she did.

37th. Were or were not plaintiffs induced by said representations, if any, to purchase said property? Ans. We think they were.

38th. Did or did not Mrs. Hopkins further state that she would surrender possession of said property by the 1st of November, 1869? Ans. We think she did.

39th. Did or did not the plaintiffs, immediately after said representations of Mrs. Hopkins to them, purchase said property from said Jennings and take a deed of conveyance therefor to Mrs. Stanley? Ans. They did.

40th. What is the value of the rent of said property from the time Mrs. Stanley purchased it to this date? Ans. We think about two hundred dollars.

At the time these interrogatories were propounded to the jury, Mrs. Hopkins objected to them, on the ground that they were insufficient to cover all the issues, etc.; and upon the return of the verdict she objected to its being received,

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and moved that the jury be sent out again for further deliberation and to make more certain and definite answer; she also, at the proper time, moved for a *venire de novo*. These objections and motions, however, were all overruled, and exception taken. Judgment was rendered in favor of the plaintiffs below for the recovery of the property.

The sufficiency of the verdict is questioned; and that question is fully presented by the record.

We do not approve of the method adopted in this case of preparing a special verdict, that is, by propounding to the jury questions or interrogatories to be by them answered. The statute only authorizes interrogatories to be put, to be answered by the jury where there is to be a general verdict. 2 G. & H. 205, sec. 336.

There are cases, such as that of *Crassen v. Swoveland*, 22 Ind. 427, where a special verdict was not demanded, but where interrogatories covering the whole case were put and answered, on which judgment was rendered, the parties being deemed to have waived the finding of a general verdict. Interrogatories, as before observed, are to be put only on the theory that there is to be a general verdict. But either party may demand a special verdict. When such verdict is demanded, "the jury are to find the facts only, leaving judgment thereon to the court." 2 G. & H. 205, sec. 335. To enable the jury in such case to discharge their duty understandingly, it is the right of each party to draw up, in proper form, a statement of such facts as he conceives the evidence establishes, to be submitted to the jury. If this is done on each side, the jury will have before them in proper form, what is claimed to be proved on each side. The jury may adopt either the one or the other, if in their judgment the evidence justifies it, or they may adopt either the one or the other in part and reject it in part, as the evidence may require; or they may, doubtless, reject both, and proceed in their own way to make out a statement of the facts they find to be proved. *The Pittsburgh, etc., R. W. Co. v. Ruby*, 38 Ind. 294. But Mrs. Hopkins did not object to the

mode adopted. Indeed, she assumed that it was the proper practice, inasmuch as she prepared interrogatories to be propounded to the jury for their response.

But the interrogatories put were not all sufficiently answered to make them the basis of a valid judgment. Passing over some uncertainty involved in several of the other questions and answers, it will be noticed that the twenty-ninth was answered, "we think not;" the thirty-second "we think it was;" the thirty-sixth, "we think she did;" the thirty-seventh, "we think they were;" the thirty-eighth, "we think she did."

The questions thus answered are important ones, especially those relating to the supposed estoppel; and we have, after full consideration, concluded that the answers are insufficient. The other questions are answered generally with positiveness and certainty. These were answered only as the jury thought. It would seem as if, when they came to consider the evidence bearing upon these questions, the jury could not get the full consent of their judgments to answer them positively, but were willing to express the inclination of their minds as above shown. We are not satisfied that the jury meant to return as facts matters about which they expressed only their thoughts. In the case of *Diehl v. Evans*, 1 S. & R. 367, the jury had returned that they were "of opinion" that a certain matter had transpired. TILGHMAN, C. J., said in relation to it: "An opinion is not a legal verdict. The finding must be positive." On the subject of verdicts we make the following quotations: "It has long been well settled, that the courts will give validity to verdicts when they perceive the substance of the issue to be contained in the verdict, however rude or informal the finding of the jury may have been expressed. In the language of Ch. J. HOBART, 'the court will work the verdict into form, and make it serve.' For verdicts are to have a reasonable intendment, and to receive a reasonable construction, and are not to be avoided unless from necessity, originating in doubt of their import, or immateriality of the issue found, or their

manifest tendency to work injustice." Graham & Waterman New Trials, 159. The following paragraph may be found in vol. 3, p. 1378, of the same work:

"The verdict must be certain, positive, and free from all ambiguity. It must convey on its face a definite and precise meaning, and must show just what the jury intended. An obscurity which renders it at all doubtful will be fatal to it. It would be extremely hazardous for the court, were it permitted to do so, to attempt to interpret it. It would, in effect, be making a new verdict, without, by any means, a certainty of rendering as the jury meant to find. Thus would the court usurp the office of, and supersede the jury; and the second result would be even less reliable, and therefore less satisfactory than the first. Loose, careless, and imperfect verdicts would multiply, until trial by jury would become an empty and useless form, the court supplying, by guess, what appeared to it to be deficiencies."

The answer to the thirty-second interrogatory went to the question whether the bond was surrendered and cancelled with the knowledge and consent of Mrs. Hopkins.

The succeeding interrogatories, that were answered as the jury thought, had for their object the development of such facts as would estop Mrs. Hopkins to set up her claim to the property as against Mrs. Stanley. We do not pass upon the legal merits of the case, the verdict being insufficient to enable us to do so. We may observe, however, that we see no legal reason why a married woman should not be estopped by the same conduct that would estop her were she sole. In *Wright v. Arnold*, 14 B. Mon. 638, it was said: "The doctrine is well settled, that neither infancy nor coverture will constitute any excuse for conduct which in other persons would, as it regards purchasers for a valuable consideration, be deemed unjust and fraudulent." See, also, Story Eq., sec. 1536.

We are of opinion that the court erred in not requiring more definite answers to be made, and in rendering judgment for the plaintiff on the verdict as returned.

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The judgment below is reversed, with costs, and the cause remanded for a new trial.

DAVIS ET UX. v. DAVIS ET AL.

PLEADING.—*Partition.*—An answer in a partition proceeding alleging that real estate belonging to the defendant was exchanged for the real estate sought to be partitioned, and that the title to the latter real estate should have been made to the defendant, and alleging that the title was held in trust for the defendant, is good on demurrer, though it does not particularly describe the real estate of the defendant which was exchanged for the real estate in question.

TRUST.—*Separate Real Estate of Wife.*—If the separate real estate of a wife be exchanged for other lands, under an agreement that the deed shall be made to her, and the deed be taken in the name of her husband, without her consent, she has an equity to have the contract or trust enforced against the heirs of her husband.

CONVEYANCE.—A paper purporting to be a deed of conveyance which contains no words of conveyance, and fails to name any grantee, does not show the conveyance of any title.

From the Madison Circuit Court.

M. S. Robinson and *J. W. Lovett*, for appellants.

J. W. Sansberry, *E. B. Goodykoontz*, *W. R. Pierse*, and *H. D. Thompson*, for appellees.

DOWNEY, C. J.—This was a petition for the partition of certain real estate, filed by the appellants, Doctor B. Davis and Matilda Davis, his wife, against the appellees, Ann Davis and Harriet, Oliver, John, and Emily Eads. Ann Davis, now again married, was the widow, and the other parties, except Doctor B. Davis, were the children of Oscar F. Eads, deceased, who was at his decease the owner in fee of the lands. The lands sought to be parted were, 1st. The south half of the north-east quarter of section sixteen,

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township nineteen, range seven east. 2d. The south-west quarter of the south-east quarter of that section. 3d. The north-east quarter of the north-west quarter of the south-east quarter of the same section. The infants answered by their guardian. Ann Davis answered in several paragraphs, the first of which was a general denial; in the second, she alleged that she was the owner in fee simple in her own right of all the land sought to be divided; and in the third, she set up a claim to the land in question, and alleged that it was received in exchange for certain real estate, of which there is no description in the complaint, which belonged to her, and which she and her husband conveyed to one Sparks, who conveyed said land in question to her husband. She alleges that said Sparks agreed to convey said land to her; that her husband, Oscar F. Eads, attended to and transacted the business of exchanging said lands, but he, in procuring the deed from Sparks, in fraud of her rights and in violation of her agreement with Sparks, took the deed in his own name, which is the only title he ever had to said lands; that he never paid any consideration for the same, but the consideration was wholly paid by her as aforesaid; that she never agreed to the conveyance of said land to her said husband; that he procured the deed to be recorded without disclosing the fact to her that the deed had been made in his name for about a year, when she made the discovery, and then immediately demanded of him that he should cause the same to be conveyed to her; that he then promised her that he would immediately have the title conveyed to her, and that until he did so he would hold the same in trust for her; and he then represented to her that the deed did not vest the title in him, but that the land was hers, and that the deed was made to him so that he could hold the title as her trustee, and that he had so held the same ever since the deed had been made to him by Sparks. She then alleges that it was the agreement, when the deed was made to her husband, that he would convey the land to her, and that he received the title as her trustee, and in no

other way, and that her said husband still continued to promise and agree to have said real estate conveyed to her up to the time of his death; that in consequence of such facts she had, since her husband's death, remained in the actual possession of said land, and put lasting and valuable improvements on the same, of the value of seven hundred and fifty dollars, by clearing land, ditching, digging and walling cellar, building smoke-house, chicken-house, wood-house, dry-house, and corn-crib. She prayed for a decree recognizing her right to said land, that the title be conveyed to her, and that her title be quieted, etc.

The second paragraph of the answer of Ann Davis was stricken out on motion of the plaintiff, on the ground that the matter set up was admissible under the general denial. The plaintiffs demurred to the third paragraph, on the ground that the same did not state facts sufficient to constitute a cause of action or to constitute a defence to the action. This demurrer was overruled, and the plaintiffs excepted. The issues were then completed by the filing of a general denial of the third paragraph of the answer. To this stage of the case, it had been in the common pleas, but here, because it was supposed that the title to real estate was involved, and that that court would no longer have jurisdiction of the case, it was transferred to the circuit court. In the circuit court, Ann Davis filed a fourth paragraph of answer, alleging that her husband owned at his decease, in all, two hundred acres of land, including that in question; that she was duly appointed administrator of his estate, and before the commencement of this action, had, by order of the proper court, sold it all for the payment of debts, except the part mentioned in the petition in this case, and applied the proceeds to the payment of the debts of the deceased; and that "she did not disclaim her interest to said purchase; wherefore she is estopped from claiming any interest in the real estate so sold as aforesaid; and asks that her interest, one-third of said two hundred acres of real estate of which said Oscar F. Eads died seized, be set off to her out

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of the real estate described in the plaintiffs' complaint." The plaintiffs here again moved the court to strike out the second paragraph of the answer of Ann Davis; the motion was overruled, and the plaintiffs excepted. As this paragraph had been once stricken out, there was no error in refusing to strike it out a second time. The plaintiffs again demurred to the third paragraph of the answer, and also demurred to the fourth paragraph. This demurrer to the third paragraph was also overruled, but the demurrer to the fourth paragraph was sustained. The plaintiffs then again replied to the third paragraph of the answer by a general denial thereof.

The issues were tried by the court, and there was a finding that Ann Davis was the equitable owner of the first described tract in the petition under the third paragraph of her answer, in her own right; that she was the owner of one-third of the residue, and her said children are the owners of the other two-thirds. Commissioners were appointed to make partition accordingly. The commissioners reported that the land ordered to be partitioned could not be divided, etc., and the court ordered it to be sold, etc.

A motion for a new trial was made at the proper time and overruled, and an exception was duly taken. The evidence is in the record. Two errors are properly assigned in this court: 1st. The overruling of the demurrer to the third paragraph of the answer of Ann Davis; and, 2d. Refusing to grant a new trial on the motion of the plaintiffs. The appellee Ann Davis filed a confession of the errors, January 9th, 1873; but afterward, December 19th, 1873, she withdrew the offer.

The first objection urged against the third paragraph of the answer is, that it does not particularly describe the real estate which it is claimed was conveyed by Ann Davis and her husband, Eads, to Sparks, as the consideration for which he agreed to convey and did convey the land to Eads, which is now claimed by Ann. We think it is substantially alleged that Ann and her husband, Eads, conveyed certain real estate belonging to her to Sparks, in consideration of

which Sparks conveyed the lands in question to Eads. Had counsel for the plaintiffs insisted that this allegation should be made more specific and certain, it should probably have been ordered by the court. 2 G. & H. 112, sec. 90. There would not appear to be the same reason for particularity in stating the consideration of an executed contract, as there is where the contract is executory.

The other objection made to the third paragraph of the answer of Ann Davis is, that the facts alleged do not show that she is entitled to claim the land; that there is no resulting trust or trust of any kind shown to exist in her favor. We think otherwise. It appears to us that if it is true that her land was exchanged for this, and she was promised that the deed should be made to her, and it was taken in the name of her husband without her consent, she has an equity to have this contract or trust enforced against the heirs of her husband. *Dayton v. Fisher*, 34 Ind. 356; *Watkins v. Jones*, 28 Ind. 12; *Glidewell v. Spaugh*, 26 Ind. 319; *Resor v. Resor*, 9 Ind. 347. Among the reasons urged for a new trial, it was contended that the finding of the court was not sustained by sufficient evidence. We think this objection to the judgment must be sustained. Ann Davis, in the third paragraph of her answer, upon which judgment in her favor was rendered for the title to the eighty-acre tract of land, alleges that the land was conveyed to Eads, her husband, by Sparks. The general denial put this in issue. A deed is in the record from Sparks, but, whether by mistake or for some other reason we do not know, it contains no words of conveyance and fails to name any grantee. It commences as follows: "Francis Sparks and wife, Matilda Sparks, of Madison county, and State of Indiana, for the sum of six thousand dollars, the following real estate," etc. This deed was given in evidence by the plaintiffs to show title in Eads, but we do not see that this can make any difference. It fails to show title in Eads for any purpose.

The judgment is reversed, with costs against Ann Davis; and the cause is remanded, with instructions to grant a new trial.

The Newton County Draining Co. *et al.* v. Nofsinger *et al.*

THE NEWTON COUNTY DRAINING COMPANY ET AL. v. NOS-
SINGER ET AL.

DRAINING COMPANY.—*Articles of Association.*—*Description of Lands and Proposed Improvement.*—Where articles of association of a draining company provide that the jurisdiction of the company shall include four townships in a county, and shall have reference to all the wet and overflowed lands in said townships, particularly the lands of certain designated persons, a schedule of whose lands is appended to the articles, and say that the object of the association shall be the draining and ditching of the lands aforesaid, and it is proposed therein to construct divers ditches, etc., without defining the routes of the same, the articles do not sufficiently specify the contemplated improvements or the lands to be affected thereby.

SAME.—Where there is no legal incorporation of a draining association, owners of lands assessed are not estopped from resisting the collection of the assessments, because a part of the contemplated ditching has been completed at great expense, thus benefiting the lands of such owners, with their knowledge and without objection.

INJUNCTION.—*Illegal Corporation.*—A party who is about to be damaged by the act of a company assuming to act as a corporation, but never legally organized as such, may bring his action for an injunction against such company in the corporate name.

From the Newton Circuit Court.

E. L. Urmston, C. H. Test, and D. V. Burns, for appellants.

DOWNEY, C. J.—This was an action by the appellees against the appellants, the object of which was to enjoin the collection of certain assessments of benefits to the lands of the appellees, the issuing of bonds, and securing the same by mortgage, and to enjoin the company and its contractors from further proceeding with the construction of its drain, etc. It is alleged that the company claims to be a corporation organized under the act which took effect May 22d, 1869, and which is found in 3 Ind. Stat. 222. A demurrer to the complaint was filed by the defendants and overruled by the court. An exception was duly taken by the defendants. As the sufficiency of the articles of association is questioned, it seems necessary to set out the parts thereof in question, which are as follows: “Articles of association

of the Newton County Draining Association. Articles of association made and entered into by the undersigned owners, and being interested in wet lands lying adjacent to the Kankakee river, in Newton county, Indiana, and in Lake, McClellan, Beaver, and Jackson townships, in said Newton county; and the undersigned hereby enter into the following voluntary association for the purpose of constructing drains, dikes, and levees, and also for the purpose of draining and protecting said lands, and to ditch, widen, deepen, make new channels into said Kankakee river, and regulate the tributaries and inlets within said county and townships, and to do and perform all acts necessary to be done and performed in and about the said premises, in as full and ample a manner as we are entitled and empowered to do under an act entitled 'an act to authorize and encourage the construction of levees, dikes and drains, and the reclamation of wet and overflowed lands by incorporated companies, and to repeal all former laws relating to the same subject.' Approved May 22d, 1869.

" 1. The corporate name of said association shall be known and designated as 'The Newton County Draining Company.'

" 2. The jurisdiction of this company shall include the townships of Lake, McClellan, Beaver, and Jackson, in Newton county, State of Indiana, and shall have reference to all wet and overflowed lands in said townships, particularly to the lands of Alexander J. Kent, as designated in schedule marked A, and hereto attached and made part hereof, and the lands of Thomas R. Barker, as designated in schedule marked B, and hereto attached and made part hereof, and also the lands of Constantine B. Cones, as designated in schedule marked C, hereto attached and made part hereof, and also the lands of Nathaniel West, as designated in schedule marked E, hereto attached and made part hereof, and also the lands of Charles French, as designated in schedule marked F, hereto attached and made part hereof, and the lands of Alpheus S. McCullough, as described in schedule marked G, hereto attached and made part hereof, and the

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lands of William Burton, as described in schedule marked I, and lands of Algy Dean, as described in schedule marked J, and lands of Isom Burton, as described in schedule marked K, and lands of John H. Luers, described in schedule marked L.

“3. The object of said association shall be the draining and ditching of the lands aforesaid, and the draining and ditching of the wet and overflowed lands of all who may hereafter join said association; and to that end they purpose cutting a ditch or channel from Beaver lake in said county to Beaver creek in said county, to open divers ditches and channels leading into Beaver lake, Beaver creek, and the Kankakee river, widen and deepen the state ditches that are in said townships of Lake, McClellan, Beaver, and Jackson, and open divers channels and ditches into said state ditches; also, to cut ditches and channels to drain the water from the Black Marsh into the Iroquois river by way of the Big Slough in Jackson township.”

The articles of association are signed by eighteen persons, and schedules of the lands of Kent, Barker, Cones, West, French, McCullough, William Burton, Dean, Isom Burton, and Luers follow.

It is objected to the articles of association that they are void, because they do not contain any sufficient description of the lands, the intrinsic value of which was liable to be affected by the proposed work; and because they do not give or contain any plan or description whatever of the intended improvements, nor of the ditch or ditches, drain or drains by the company proposed to be constructed. According to the exposition of the draining law in former decisions of this court, the articles of association in this case do not sufficiently specify the contemplated improvement or the lands to be affected thereby. In the second clause, it is stated that the jurisdiction of the company shall include four townships in the county, and shall have reference to all wet and overflowed lands in those townships, particularly the lands of certain designated persons, a schedule of whose

lands is appended. Had the statement been limited to the specified lands, there would have been some degree of certainty as to the lands to be affected. But we are not informed whether the designated lands are wet and overflowed lands or not, or, if part of them are of that character, what part. But what as to the other lands in the townships? How is it to be known what portion and what particular tracts of them are to be treated as falling within the "jurisdiction" of the company? How is it to be known by any land-owner whether the articles of association and the aim of the company "shall have reference" to his lands or not?

Again, what particular works do the company propose to construct? What are the objects of the association as stated in the articles of association? "The draining and ditching of the lands aforesaid?" What lands are the lands aforesaid? Clearly not the lands mentioned in the schedules appended to the articles of association alone; for all the wet and overflowed lands in four townships have been mentioned, and we think must be included in "the lands aforesaid." To this end they propose to cut a ditch or channel from Beaver lake to Beaver creek. They propose to open divers ditches and channels leading into Beaver lake, Beaver creek, and the Kankakee river. They propose to widen and deepen the state ditches in the three designated townships. They propose to open divers channels and ditches into said state ditches. They propose also to cut ditches and channels to drain the water from the Black Marsh into the Iroquois river by way of the Big Slough in Jackson township. According to the case of *O'Reiley v. The Kankakee Valley Draining Co.*, 32 Ind. 169, the articles of association in this case are void. It was there said: "Parties whose interests are to be affected are not to be kept in ignorance of the purpose of the company until the surveys are made and accepted by the company. They are entitled to have a voice in every corporate act, and to have notice by the articles themselves whether or not their interests are to be affected by the work contemplated." See, also, *The Skelton Creek Draining Co. v.*

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Mapck, ante, p. 300; *West v. The Bullskin, etc., Co.*, 32 Ind. 138; and *Seyberger v. The Calumet Draining Co.*, 33 Ind. 330. In the last named case, although the general doctrine laid down in the former cases is recognized, there may be a question whether the case was correctly decided according to that doctrine. The objects of the company were certainly stated in a very general and indefinite manner in the articles of association in question in that case.

It is alleged in the complaint that after the assessment was made and recorded, the company abandoned its original articles of association, or its organization under them, by afterward, to wit, on the 10th day of May, 1871, filing for record and causing to be recorded, etc., other and distinct articles of association, under which said pretended company now claims its corporate existence and power to act; and the plaintiffs allege that said pretended company did not, after the filing for record of the last mentioned articles of association, in any manner attempt to have appraisers appointed, as by said act it should have done, nor did said pretended company have any valid schedule of assessments of benefits filed for record in, etc., but plaintiffs aver that on the contrary the said pretended company did, on the 3d day of June, 1871, refile for record, in, etc., the schedule of assessments of benefits before that time made by said pretended appraisers, as hereinbefore stated, and without having given any notice of any intended assessment, and without requiring said pretended appraisers to examine the lands, the intrinsic value of which was liable to be affected by the proposed ditches, nor did said pretended appraisers make any examination whatever of the said lands.

There are numerous other objections to the validity of the assessments stated in the complaint, but we do not deem it necessary to state or consider them.

The only other question presented by the assignment of errors relates to the sufficiency of the first paragraph of the answer, to which a demurrer was filed by the plaintiffs, and which was sustained by the court. There is nothing in this

paragraph of the answer, and, indeed, could not be anything which could obviate the objections to the articles of association which we have found to exist. As to the surrender of its articles of association or its organization, the answer states the making and recording of the original articles of association, and that afterward, to wit, in the month of May, 1871, for the purpose of more particularly and specifically designating the route and bearings of the work, and the main channel and the laterals thereof, the said company amended the original articles of association, which amended articles of association, were duly recorded in, etc. ; that said company has not abandoned either articles of association, but is acting under each and both, and claims all the rights and privileges which each and both of said articles of association confer on said company.

We need not decide whether such a company can thus correct or amend its articles of association, after the same have been recorded; nor need we determine whether the amendment, if otherwise proper, was such as to cure the defects in the originals. The complaint alleges, and the fact appears from the dates given, that the assessment, the validity of which is in question, was made before the alleged amendment to the articles of association was made. The original articles of association were recorded on the 23d day of April, 1870; the assessors were appointed at the September term of the circuit court, in the year 1870; notice of the intended assessment was given in that year, but at what particular time is not stated in the answer. The appraisers returned the schedule some time prior to January 2d, 1871, and on that day, it is alleged, the secretary of the company filed the same for record in the recorder's office. The amended articles were recorded, as we have seen, in the month of May, 1871. Under these circumstances, the attempted amendment of the articles of association can not affect the question as to the validity of the assessments in question.

It is alleged in the first paragraph of the answer, the one

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which we are considering, that before the commencement of this suit, said defendant had completed a large portion of the ditching contemplated by said articles of association, to wit, about one-half of the same, at a large expense, to wit, about twenty thousand dollars, thereby draining said plaintiffs' lands and others in the vicinity thereof, and fitting them for greater agricultural advantages and increasing their market value to an amount far exceeding the amount of said assessments, without any notice of said plaintiffs' dissatisfaction therewith or objection thereto, though they knew the said work and ditching were being constructed; wherefore the said defendants say that said plaintiffs should be estopped from complaining thereof, etc. If we are right in the conclusion at which we have arrived, that there was no legal incorporation of said company, we think it must follow that there is no ground for an estoppel shown. It is not like the case where a party has contracted with a company as a corporation, and is therefore estopped to dispute its existence as such. It is not a mere irregularity in the assessment which it is sought to estop the plaintiffs to deny, and which might, in some cases, be a proper application of the doctrine; but it is the very existence of the corporation, a fact which lies at the foundation of the proceeding, and without the existence of which, everything based thereon must be invalid. In our judgment the court committed no error in its ruling upon the demurrer to the first paragraph of the answer.

It was suggested in consultation, though the question is not made by counsel for the appellants, that as the action in this case is against the corporation, with others, the fact that it was legally organized as such can not be disputed. This has not been so ruled in any similar case in this court. On the contrary, the cases of *O'Reiley v. The Kankakee Valley Draining Co.*, *Seyberger v. The Calumet Draining Co.*, and *The Skelton Creek Draining Co. v. Mauck*, *supra*, and perhaps others, are cases where the action was thus brought and sustained in this form. Those cases, like this, were brought simply to restrain the company from doing certain

acts, apparently recognizing the existence of the corporations *de facto*, but insisting that they were not such *de jure*. The object was not to have a judgment declaring that the corporation never had any existence or to declare its charter forfeited, but only to protect the plaintiffs from injury resulting from the acts of the pretended corporation. When the proceeding is by information in the name of the State, and it is insisted that the pretended corporation never had any existence, we have held that the information should be against the persons claiming to be such corporation, and not against the corporation by its name. *The Mud Creek Draining Co. v. The State, ante*, p. 236. There is an apparent inconsistency in suing a corporation and at the same time alleging that it is not a legal corporation. But should the party who is about to be damaged by the act of such corporation bring his action against those claiming to act under the authority of the corporation, and succeed in restraining them, possibly others claiming to act as the officers or agents of the company may proceed to do the same act. If the pretended corporation shall be restrained and enjoined from doing the act on account of its defective organization, no one acting in its behalf could then do the act. It may be conceded that the question is one not free from doubt and difficulty, but we prefer to follow the cases which have already been decided, in which this form of proceeding has been sustained.

The judgment is affirmed, with costs.

PETIT. J.—I do not concur in the foregoing opinion. A corporation is sued and brought into court by its corporate name to answer a charge that it never had an existence. This is an absurdity and is self-destroying. Would it do to sue a person by name and then aver in the complaint that no such person ever lived? I think the demurrer to the complaint should have been sustained.

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CITY.—*Liability for Defect in Sidewalk.*—Where a city improved one sidewalk and the roadway of a street, but did not improve the opposite sidewalk, and a lot owner on the side unimproved made a sidewalk, in front of his property, under the direction, as to the grade thereof, of the civil engineer of the city (being a continuation of a sidewalk which had been used by the public for several years), which he so constructed that it terminated in an abrupt descent, over which a foot passenger fell and injured himself in the night-time.

Held, that the city was liable for the injury, in the absence of negligence of the injured party, the city having notice of the dangerous character of the sidewalk, notwithstanding such sidewalk had been so constructed without authority from the city.

From the Putnam Common Pleas.

S. Claypool, J. A. Matson, and C. C. Matson, for appellant.

D. E. Williamson, A. Daggy, S. Turman, and J. Birch, for appellee.

BUSKIRK, J.—This was a suit brought by Higert, the appellant against the city of Greencastle, appellee, for an injury alleged to have been received by reason of a defective sidewalk in said city.

The complaint is in two paragraphs.

The first charges that the defendant so negligently and unskilfully graded Jackson street, in said city, and the sidewalks thereof, and so permitted and caused the same to be done, as to produce a dangerous fall in the east sidewalk of said street, and at a place used and open for public travel, and suffered the same to remain for a long time in said dangerous condition—having full knowledge thereof—without lights or guards, and that plaintiff, while passing along said street in the night-time, at said place, without fault on his part, fell and was injured; wherefore, etc.

The second paragraph alleges that the said defendant made an order and caused said Jackson street to be graded to the established grade, and improved between the sidewalks of said street along and adjacent to the place where said injury occurred, and that afterward one John F. Jones, under the direction of the civil engineer of said city, made

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and established the grade of his sidewalk along the line of said improvement and adjacent to his lots, and thereupon paved and curbed his sidewalk; and that by reason of said work by said Jones, and of the improvements by the city along Jackson street, between the sidewalks, there was created a perpendicular fall from the surface of said pavement and over the curb thereof into said alley, of more than four feet, into which said plaintiff fell and was injured, without fault on his part; and that defendant had knowledge of said defect in said sidewalk, but failed to remove or repair the same.

To this complaint the defendant answered in four paragraphs: The first paragraph was a general denial. To the third paragraph of answer the court sustained a demurrer.

The second paragraph of answer first denies that said fall was made by defendant, or by any agent, servant, or employee of defendant, or by any one acting under any authority of defendant, but avers that said fall, if any such existed, was made by one John F. Jones in the construction of a work for his own private use and benefit, and not for the use or benefit of the defendant, or of the public, and over whom, in the making thereof, defendant neither exercised nor assumed to exercise any authority, direction, or control whatever; and, further, that the place where said injury is alleged to have occurred was not on a part of said street which was then, or ever had been, prior thereto, used for public travel, or for persons or conveyances to pass over in any manner whatever, but was on an unimproved part of said street, and where said city never had made any excavations, fills, or improvements, or done any work of any kind; that at said time, on the opposite side of said street, there was a good, smooth, substantial sidewalk, of ten feet in width, safe and convenient, and used for public travel; and also, adjacent to said place, said street was to the width of forty feet well improved, smooth, free from all obstructions, and open and used for public travel, over which sidewalk or street said plaintiff might have passed with safety; that said plaintiff

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was a citizen of said city, and well acquainted with the condition of the public streets therein, and carelessly and negligently left the improved and travelled part, and in the nighttime, it being very dark, without a light, attempted to pass rapidly over said unimproved part of said street, and thereby, of his own fault, received said injury. And said paragraph further alleged that, in improving the streets of said city, it was, at the time of said injury, and had been for a long time prior thereto, the general custom and plan of said city, in making said improvements, to make a sidewalk for public travel upon one side of the streets only; that at said time the public streets were, to a very large extent, so improved, all of which was at said time well known to said plaintiff; that the natural surface of the streets and of the ground upon which said city is situate is exceedingly hilly and broken, and that to improve the streets therein to the full width would be burdensome, oppressive, and ruinous to property holders; for which reason said city had adopted the plan aforesaid, all of which was well known to the plaintiff and the public, but that said plaintiff, in view of said facts and of his knowledge thereof, failed and refused to use due care and caution, and negligently left the travelled part of said street, and thereby received said injury, etc.

The fourth paragraph of the answer denies that the place where said injury occurred was on a public street, at a place used for public travel, but avers the same was on an unimproved part of said street, and where no sidewalk had ever been made or attempted to be made by said defendant, and at a place which was not then, and never had been used for public travel; that said plaintiff, well knowing said facts, carelessly and negligently undertook to pass over said unimproved part, and of his own wrong and fault received said injury. To the second, third, and fourth paragraphs of this answer, the plaintiff filed a demurrer, which was by the court sustained as to the third, and overruled as to the second and fourth; which ruling of the court in overruling said demurrer

to the second and fourth paragraphs of said answer the plaintiff assigns for error.

There was issue, trial by jury, verdict for the defendant. The court overruled a motion for a new trial and rendered judgment for appellee on the verdict of the jury.

Three of the reasons assigned for a new trial are discussed by counsel for appellant.

1. The refusal to instruct as requested by the appellant.
2. The instructions given by the court of its own motion.
3. That the verdict was not sustained by, but was contrary to, the evidence.

The instructions requested by the appellant and refused by the court were as follows:

“1st. Under the laws of the State of Indiana, the common council of a city, incorporated under the general laws of the State for the incorporation of cities, has exclusive power over the streets (Acts of 1867, p. 63), including sidewalks and alleys, and therefore the municipal corporation which they represent is liable for all injuries happening by reason of their negligence in suffering the streets, alleys, or sidewalks to remain in a condition hazardous to the life and limb of persons passing along the streets and sidewalks.

“2d. The defendant, if a municipal corporation, organized under the laws of the State of Indiana, is liable for injuries sustained by reason of unguarded excavations or perpendicular falls, made in a public street or sidewalk within the bounds of the city, if the same be hazardous to the life or limbs of persons passing along said streets, and if the city had knowledge of such condition of things, and the injury happened to the party complaining, without blame or neglect, or want of care on his part, although the fall or excavation may have been made by a third person.

“3d. If Jones, even without the previous order of the city authorities, made and constructed the sidewalk adjacent to his property according to the established grade of the city, for his own private convenience, and after constructing said

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sidewalk, there became and there was a perpendicular fall from said walk into the alley, endangering the lives and limbs of persons passing along said sidewalk in the night-time, and if the city had knowledge of such condition of things, and failed for an unreasonable time to guard against such dangers, either by putting up guards or filling said alley, or in some other way, for an unreasonable time, and the plaintiff by reason of such condition of the said sidewalk, and such neglect of the city, suffered injuries by falling from said sidewalk into the alley, without carelessness or want of due care on his part, he, the plaintiff, being ignorant of such condition of the sidewalk, the city is liable to the plaintiff for such damages as he may have so sustained.

"4th. If you find the sidewalk in the condition complained of by the plaintiff, it is a question of fact for you to determine from all the evidence in the case, and under the instructions of the court, whether the city had notice of said defect, and whether it was negligence in the city.

"5th. Notice to the common council is notice to the city. •

"6th. Whether an obstruction or fall in a sidewalk renders the sidewalk unsafe, if the fall is not in a travelled part of the sidewalk, is a question of fact for the jury.

"7th. If you find that the sidewalk beyond the alley where the said injury is alleged to have happened was not used by the public, this does not of itself relieve the city from liability.

"8th. Even if the sidewalk beyond the place of the alleged injury was not used, if there was a fall in the sidewalk at the place alleged, and such fall was hazardous to the public, and the city knew it, it was the duty of the city to protect the public, either by erecting guards at that point, or in some other way.

"9th. The simple fact that the plaintiff was a citizen of the town is no defence.

"10th. The fact that Jones erected said sidewalk is not of itself a defence for the city.

"11th. The fact that there was another street or alley by

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which the plaintiff might have reached the point to which he was going does not relieve the city from liability. .

“ 12th. The city is not relieved from liability on account of her neglect, by reason of the fact that Jones or any one else may be liable for the same injury.

“ 13th. There may be localities where it is the duty of the city to work the streets for travel over the whole width and over both sidewalks.

“ 14th. Although a town or city is not ordinarily bound to fence its streets, it is bound either to erect fences or railings at places which would otherwise be unsafe for travellers exercising ordinary care or to render such places safe by improvements.

“ 15th. If Jones established the grade of the sidewalk, and built his pavement upon said grade, and afterward the city ratified said act, the legal effect is the same as if the work was done pursuant to the direction of the city.

“ 16th. If after the city had established the grade, improved and filled the street according to the established grade, it became and was the duty of Jones to improve the sidewalk, and therefore the legal effect of Jones' constructing the sidewalk is the same as if the city had directed Jones to make the improvement; and if the jury are satisfied from the evidence that the said fall was the result of the improvements made by the city, or of the improvements which the improvements of the city rendered necessary, the city is liable for injuries happening to the plaintiff without negligence on his part.”

The instructions given by the court, of its own motion, were as follows :

“ 1st. An incorporated city, under the laws of the State of Indiana, has the exclusive jurisdiction, power, and control over the improvement of the streets, alleys, and sidewalks of the city, but this exclusive jurisdiction over the subject does not require the city to improve all the streets, alleys, and sidewalks of the city immediately upon its organization and at the same time.

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“ 2d. The city is to determine by her council what streets, alleys, or sidewalks shall be improved, and the manner of their improvement, taking into consideration the wants of the public, the proximity to the place where the business of the city is done, and the accommodation of the most densely populated parts of the city. But in determining what streets, alleys, or sidewalks, or parts thereof, shall be improved, the council is performing a judicial act for which the city is not liable.

“ 3d. But after the city council has passed an order for the improvement of any street, alley, or sidewalk, and commenced the improvement of the same, she is responsible for the improper or negligent construction of the same, and responsible for not keeping the same in proper repair afterward, for the reason that, attempting to improve, they hold out to the public that they have made that portion of the street, alley, or sidewalk in a safe condition for the use of the public.

“ 4th. If the jury believe, from a preponderance of the evidence, that a place on the east sidewalk of Jackson street, where the alleged injury occurred was, before the injury, attempted to be improved by the city, and was done in such an unskilful or negligent manner as to cause the injury complained of, without the fault or negligence of the plaintiff, then the jury will find for the plaintiff.

“ 5th. If the jury believe, from a preponderance of the testimony, that the sidewalk on the east side of Jackson street, running south from the public square to the alley, between Walnut and Poplar streets, had been improved by the adjoining owners of the lots in accordance with the general grades and plans of the city, in improvements of the city, so as to convey the idea to the public that the improvement had been made by the city, and that the city had improved said sidewalk between said alley and Poplar, leaving a perpendicular and dangerous depression in the alley, the city is liable for any injury that may have occurred to the plaintiff

without his fault, by reason of the city not extending her improvements across the alley, so as to intersect with the improvement of the sidewalk upon the north side of the alley; by their improvement on the south side of the alley they hold out to the public that the intersection had been made, and the city would be liable unless the plaintiff had personal knowledge of the depression in the alley.

"6th. If the jury believe from the evidence that the city did not make any of the improvement on the sidewalk where the alleged injury occurred, or south and immediately adjoining thereto, so as reasonably to induce the public, in travelling along the sidewalk, to suppose the alley was also improved and in a safe condition, the city would not be liable.

"7th. The custom of the city in the improving of only one sidewalk on a street, except in the most populous and business parts of the city, a long continued residence in the city of the plaintiff, his knowledge of the custom and manner of improving the sidewalks, the good condition of the streets and sidewalks immediately west and adjoining the place where the alleged injury occurred, are proper facts and circumstances to be considered in determining the negligence of the defendant or the want of care and prudence in the plaintiff's attempting to pass along that sidewalk, of a dark night without a light.

"8th. If it appears by the evidence in this case that by the want of ordinary care and prudence the plaintiff contributed directly to the injury, he can not recover; in order to make the city liable he must make a case in which he was without blame or negligence, and the city was entirely in fault.

"9th. The question of unskilful and negligent construction of improvements or repairs on improvements by the defendant, the negligence or want of proper care by the plaintiff, are questions exclusively for the jury to determine.

"10th. The jury is the exclusive judge of the testimony

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and will give to the evidence of each witness such weight and credit as they think it entitled to.

“11th. If you should come to the conclusion that the plaintiff is entitled to recover in this case, you will allow him such compensatory damages as you may think he has sustained, which will include all necessary expenses, loss of time, and pain and suffering on account of the injury. But you cannot allow him exemplary damages, which means over and above the loss sustained, as an example to others.”

Proper exceptions were taken to the giving and refusal to give the foregoing instructions.

The errors assigned are the overruling of the demurrer to the second and fourth paragraphs of the answer, and the motion for a new trial for the three reasons above stated.

The same questions arise upon the overruling of the demurrer to the answer that do upon the giving and refusing to give instructions, and we do not deem it necessary to take up in detail the several questions discussed by counsel. The real case of the appellant is presented in the second and third instructions asked and refused.

The real defence of the city is stated by her counsel as follows:

“It will be observed that the point in controversy is not whether the defendant was bound to provide a safe and convenient way for public travel on said street. The city had fully done that. The allegations of the answer, and which are entirely sustained by the evidence, are, that defendant had provided a good, safe, and convenient passway on said street, forty feet wide, and, in addition, a good and safe sidewalk, ten feet wide; that the same was amply sufficient to accommodate the wants of the public in said town or city, but that plaintiff left that part and undertook to pass along outside of the travelled and improved part, and thereby received said injury. Is, then, the defendant liable because she had not, by her common council, ordered and caused said unimproved part to be improved, or, in other words, because she had not improved said street to its full width?

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• We think not, clearly. This was a judicial act, for the non-performance of which she can not be held liable. Having improved so much as, in her judgment, the public wants required, the defendant can not be held liable because her common council did not see fit to extend said improvements so as to embrace the entire street. Neither is defendant liable for not removing an obstruction placed by a wrong-doer on such unimproved part, and which in no way interfered with and endangered travel on the travelled track. It is only on the ground that the defendant was bound, in the first instance, to improve and keep such part in a safe condition for travel, that she can be held liable for not removing obstructions placed there by a wrong-doer. Had defendant improved or attempted to improve so as to invite public travel on such part of the street, or had said injury been caused by a defect in the 'usual and ordinarily travelled portion' of said street, it would have presented a very different question."

Counsel for appellant state their position as follows:

"We do not insist that the defendant was bound to keep her streets and sidewalks in good and convenient condition for public use, but that she was bound to keep them in a reasonably safe condition, and, within a reasonable time after knowledge of the fact, to protect the public in some way from dangerous defects in her streets or sidewalks, however happening or created, whether by the action of the city, of the elements, or by a stranger, or by a wrong-doer."

The substantial facts of the case, as they appeared upon the trial, are given by John F. Jones, who testified that he was the owner and proprietor of the Jones House; that in the spring of 1869, he determined to build a brick pavement along the west side of his house, and that for that purpose he procured the services of the city engineer to fix a grade stake at the north-west corner of his lot, by which he might build. The engineer put down the grade stake, and witness followed the grade of the city as he understood, except at the south end of the pavement he lowered it somewhat, to

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avoid as much as possible the fall that would necessarily occur in the sidewalk (at the alley crossing). In building said walk, he first built a perpendicular stone wall at the south end of the pavement and then laid the bricks. When his walk was completed, there was a perpendicular fall from the sidewalk into the alley of about four feet. After the sidewalk was done, he found that the mouth of a culvert at the south end of it was obstructed, and he asked the common council to remedy it. Very soon after this, the engineer came with a force of hands and extended the mouth of the culvert of the alley a distance of twenty feet into the alley, and after doing this, the engineer covered the culvert with earth and refuse rock, and in this way raised the alley at the south end of said pavement, so that the said fall after that was only two feet or less. After this, he (witness) called the attention of two of the council to the condition of the sidewalk and alley at that point, and took them to see it. The improvement of Jackson street between the sidewalks was made by order of the common council, and that improvement rendered it necessary that he (witness) should put down a pavement, to protect his property.

On cross-examination, he stated that he got no permission from the council to build the pavement, but "I built it for my own convenience. I supposed an ordinance years ago requiring citizens to improve their sidewalks was still in force."

The real question, therefore, for our decision is, whether the city is liable for the injury sustained by the plaintiff, in consequence of the acts performed by Mr. Jones, under the facts above stated.

There have been many decisions upon the liability of municipal corporations for injuries occasioned by defective streets and sidewalks, and obstructions thereto. There is much conflict in these decisions, and there are nice shades of difference between the rulings, that are regarded as being in the main harmonious. Counsel have referred us to a large number of such cases and have reviewed many of them.

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Judge Dillon, in his work on Municipal Corporations, has made a very careful and able review of the authorities bearing upon the questions involved in this case, and has deduced therefrom certain principles of law, which he regards as settled by the weight of authority. Instead, therefore, of attempting a review of the authorities, we prefer to rely upon the deductions made therefrom by Judge Dillon.

Sections 789 and 790, commencing on page 753 and ending on page 761, read as follows:

“Sec. 789. It may be fairly deduced from the many cases upon this subject referred to in the notes, that in the absence of an express statute imposing the duty and declaring the liability, municipal corporations proper having the powers ordinarily conferred upon them respecting bridges, streets, and sidewalks within their limits, owe to the public the duty to keep them in a safe condition for use in the usual mode by travellers, and are liable in a civil action for special injuries resulting from neglect to perform this duty. Such a duty and liability are considered to exist, without a positive statute, when the following conditions concur:

“1. The place in question, whether bridge, sidewalk, or street, must be one which it is the duty of the corporation to repair or keep in a safe condition; and this duty (to keep in repair), if not specifically enjoined, must arise upon a just construction of the charter or statutes applicable to the corporation.

“2. This duty or burden must appear upon a fair view of the charter or statutes to be imposed, or rest upon the municipal corporation, as such, and not upon it as an agency of the state, or upon its officers as independent public officers. (This, however, in general, appears sufficiently where the municipality sought to be made liable exists under a special charter or general act which confers upon it peculiar powers and privileges as respects streets, their control and improvement, not possessed throughout the state at large under its general enactments concerning ways.)

“3. The power to perform the duty of maintaining the

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streets in a safe condition, by authority to levy taxes or impose local assessments for the purpose, must be (as it almost always is) conferred upon the corporation.

“Where the duty to keep streets in repair is, in terms, enjoined upon the corporate authorities, and they are supplied with the means to perform it, there is little difficulty, we think, in holding the corporation liable, on the general principles of the law, without an express statute declaring the liability to a civil action by any one specially injured by its neglect to discharge this specific duty. But where the duty to repair is not specifically enjoined, and an action for damages, caused by defective streets, is not expressly given, still, both the duty and the liability, if there be nothing in the charter or legislation of the state to negative the inference, has often, and, in our judgment, properly, been deduced from special powers conferred upon the corporation to open, grade, improve, and exclusively control public streets within their limits, and from the means which, by taxation and local assessments, or both, the law places at its disposal to enable it to perform this duty.

“The municipal corporation is not an insurer against accident upon the streets and sidewalks. Nor is every defect therein, though it may cause the injury sued for, actionable. It is sufficient if the streets (which include sidewalks and bridges thereon) are in a reasonably safe condition for travel in the ordinary modes, by night as well as by day, and whether they are so or not is a practical question, to be determined in each case by its particular circumstances. The ground of the action is either positive misfeasance on the part of the corporation, its officers, or servants, or by others under its authority, in doing acts which cause the street to be out repair, in which case no other notice to the corporation of the condition of the street is essential to its liability; or the ground of the action is the neglect of the corporation to put the streets in repair, or to remove obstructions therefrom, or to remedy causes of danger occasioned by the wrongful acts of others, in which cases notice of the

condition of the street, or what is equivalent to notice, is necessary, as will presently be stated, to give to the person injured a right of action against the corporation, unless, indeed, the matter be otherwise regulated by statute.

“ It is also essential to liability that the plaintiff should have been using reasonable or ordinary care to avoid the accident, or, in other words, he must be free of any such fault or neglect on his part, as will in actions for negligence defeat a recovery. The case would be exceptional indeed when the plaintiff could properly recover vindictive, or more than actual or compensatory damages.

“ Sec. 790. Where streets have been rendered unsafe by the direct act, order, or authority of the municipal corporation (not acting through independent contractors, the effect of which will be considered presently), no question has ever been made, or can reasonably exist, as to the liability of the corporation for injuries thus produced, where the person suffering them is without fault, or was using due care. Where the duty to keep its streets in a safe condition rests upon the corporation, it is liable for injuries caused by its neglect or omission to keep the streets in repair, as well as for those caused by defects occasioned by the wrongful acts of others; but, as in such case this basis of the action is negligence, notice to the corporation of the defect which caused the injury, or facts from which notice thereof may reasonably be inferred, or proof of circumstances from which it appears that the defect ought to have been known and remedied by it, is essential to liability; for in such cases the corporation, in the absence of a controlling enactment, is responsible only for reasonable diligence to repair the defect or prevent accidents after the unsafe condition of the street is known, or ought to have been known, to it, or to its officers having authority to act respecting it.”

It is very clearly established by the above authority that the appellee is liable for damages occasioned by the wrongful acts of John F. Jones, if chargeable with notice of the dangerous condition of the sidewalk.

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It is, however, earnestly contended by counsel for appellee that she is not liable for the injury received by the appellant, for the reason that the place where the injury was received had not been improved by the city and set apart to the public use, and did not constitute a part of the usual and ordinarily travelled portion of the street, where the corporation has made improvements, and by their acts invited public travel.

Counsel for appellee, in support of the foregoing position, argue as follows:

"In case of *Hutson v. The City of New York*, 5 Sandford, 289, the city was held liable for not keeping the 'usual and ordinarily travelled portion' of a public street in repair, but MASON, justice, in delivering the opinion of the court, at page 302, says: 'We would not be understood to go the length of deciding that whenever a street is opened by the corporation on paper, or by proceedings under the statute, it is their duty forthwith to regulate and pave it. There are several steps in the matter, all which, we apprehend, are in the legislative discretion of the corporation. It belongs to them, in the exercise of their discretion, to determine, 1st, when a street shall be actually opened for the accommodation of the public; 2d, how it shall be worked, whether as a road or street; 3d, when it shall be regulated, and the curb and gutter set; and 4th, when it shall be paved; but after they have actually opened it for public accommodation and by their acts invited the public to travel over it, the duty then becomes absolute to keep it in repair.' So in the case at bar. We insist it was in 'the legislative discretion of the corporation' to determine in what manner and how much of said street should be improved, and that it is responsible for keeping in repair so much only as it had, by its acts, invited public travel upon.

"See, also, *Whitney v. The Town of Essex*, 38 Vermont, 270; where it was held, that 'a town having a travelled track sufficiently wide and suitable for all purposes of travel, and in repair, is not liable for injuries received in consequence of a defec-

tive foot path in the highway fifteen or twenty feet from the travelled track, which the town had never worked or repaired, though the public foot travel has passed over it thirty years.'

"See, also, *Smith v. Wendell*, 7 Cush. 498. DEWEY, J. in opinion in that case, says: 'It has become well settled law, that towns are not necessarily chargeable with damage arising from every obstruction within the limits of a located highway. They are not liable for such obstructions in portions of the highway not a part of the travelled path, and not so connected with it that they will affect the security or convenience for travel of those using the travelled path.' See, also, to same effect, *Carolus v. The Mayor, etc., of New York*, 6 Bosworth, 16; *Rice v. Montpelier*, 19 Vermont, 470. In *Shepardson v. Inhabitants of Colerain*, 13 Met. 55, DEWEY, Judge, in opinion again says: 'That it is not enough that the injury be shown to have occurred within the actual limits of the located highway, seems to be well settled by authority, and upon sound principle. The contrary doctrine would, in effect, require the entire width of the highway to be free from obstructions, and fit for use for the traveller; a burden quite too onerous upon towns, that are bound to keep their roads in repair.' To the same effect is *Howard v. North Bridgewater*, 16 Pick. 189.

"It is true some of the cases cited above refer only to towns; but in *The City of Providence v. Clapp*, 17 Howard, 161, the United States Supreme Court, NELSON, Justice, hold that cities and towns are alike in their responsibility and in their immunity. But whether this be true or not, we apprehend the rule is the same, to this extent at least, that it is first left to the legislative discretion of the corporation, to determine in what manner and how much of a street shall be improved, taking into consideration the wants of the public; and having thus determined, it is then only bound to keep in repair that upon which it has invited travel. Any other doctrine would, in small cities like the one involved in this suit, situate upon hills and cut up by ravines, require all the property of the city to make the streets."

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It will be observed that the most of the cases referred to are from the New England states. In those states, the common law liability of municipal corporations, such as counties, towns, and cities does not exist, but such liability is regulated by express statutes, and the modes of proceeding are in like manner prescribed by positive enactments. The common law liability of such corporations is recognized in the federal courts, and in the most of the other states. It has been repeatedly held to exist in this State. *Silvers v. Nerdlinger*, 30 Ind. 53, and cases cited.

The rule as it exists in the New England states is stated and explained in sections 762, 763, 786, 787, and 788 of Dillon on Municipal Corporations. In determining the weight which should be given to the decisions of the courts of such states, affecting the liability of counties, towns, and cities for injuries sustained by reason of defective highways and streets, the statutes upon which decisions were based should be examined with the view of ascertaining whether they have changed the common law or simply re-enacted the law as it existed under the well settled principles of the common law.

We find the following section in the laws of Massachusetts :

"Sec. 82. No way opened and dedicated to the public use, which has not become a public way, shall be chargeable to a city or town as a highway or town way, unless the same is laid out and established by such city or town in the manner prescribed by the statutes of the Commonwealth." *Oliver v. Worcester*, 102 Mass. 489.

Similar statutes will be found in the most, if not all, of the New England states.

Under these statutes it has been repeatedly held, there is no liability unless the highway or street has been opened and dedicated to the public use.

The duty of a city in reference to the improvement of its streets seems to be correctly stated in *Hutson v. The City of New York*, *supra*.

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The time and manner of their improvement are within the discretion of the common council, except where the charter makes the duty imperative. We think the law is correctly stated in the case, where the court say, "But after they have actually opened it for the public accommodation, and by their acts invited the public to travel over it, the duty then becomes absolute to keep it in repair."

Angell on Highways, in section 263, p. 304, says: "In cities the sidewalks are considered a part of the public streets, and as such are to be kept, like the streets themselves, in a safe and convenient state of repair through their entire width. And this obligation is not varied or discharged by the exercise of the right of an adjoining owner of land to use the street or sidewalk for some private purpose, not inconsistent with the right of the public."

The city of Greencastle, having improved Jackson street and made a sidewalk on the west side, was not bound to make a sidewalk on the east side, and would not have been liable for an injury occasioned by natural obstacles on such side of the street. If the natural grade of the east side of such street had not been changed by the city or by others, to the knowledge of the city, it could not be said that the east side of said street had been opened for the public accommodation, and the public invited to travel thereon. But it is shown that there had been for many years a sidewalk on the east side of Jackson street, from the public square to Jones' hotel, and that Jones had, with the knowledge of the city authorities, made a pavement along his property and left at the south end a perpendicular fall of about four feet. After the sidewalk was completed, he found that the mouth of a culvert at the south end of it was obstructed, and he asked the common council to remedy it, and the city extended the mouth of the culvert about twenty feet and covered the culvert with earth and the refuse rock, and in this way raised the alley at the south end of the pavement, so that the perpendicular fall was only about two feet. Thus, we find three things to be true in reference to

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the sidewalk on the east side of Jackson street. 1st. That a sidewalk had existed and been used for many years by the public, from the public square to the Jones House. 2d. That Jones had, with the knowledge of the city, made a sidewalk along his property and left at the south end of it a perpendicular fall of four feet. 3d. That the city so far remedied the obstruction as to reduce the fall from four to two feet.

In the quotation which we have made from Judge Dillon, the law is said to be, that the city "is liable for injuries caused by its neglect or omission to keep the streets in repair, as well as for those caused by defects occasioned by the wrongful acts of others." This being the law, the appellee was liable for the wrongful acts of Jones, the city having knowledge of the dangerous fall, and for its neglect to repair the same.

While the appellee would not be liable for an injury resulting from a natural obstruction in a street that had not been improved, it would be liable for such injury caused by an excavation or artificial obstruction placed there by the city or others, the city having due notice and having failed to make the necessary repairs.

But the objection recurs that the city is not liable, because the place where the injury occurred was out of the travelled path and beyond the point where the sidewalk on the east side of said street had been opened to public accommodation.

We are satisfied from a careful examination of the cases referred to by counsel for appellee, that they do not support the position assumed.

The case of *Whitney v. Town of Essex, supra*, was correctly decided upon the facts of the case. It was shown that the town had provided a way sufficiently wide and suitable for the passage of all travel, and that it was in good and sufficient repair at the time of the alleged injury.

The court say: "The accident to the plaintiff did not happen upon said travelled track, nor by reason of any defect

in it, nor by reason of his being forced or misled from it."

The foot path where the plaintiff was injured was from fifteen to twenty feet from the travelled track, and in no manner connected with it, and with this path the town had never had any thing to do. The court say: "It is the settled duty of the town not only to keep the track in good and sufficient repair for the purposes of public travel, but equally its duty to keep the margins in a reasonably safe condition against injurious consequences of accidents, such as usually do, and are most likely to occur in the course of public travel. The injury in this case was not the result of any accident happening in travelling along the highway."

Again the court say: "There may be cases in which the question of the sufficiency of the highway for public travel may involve the condition of the margin and side paths."

Again the court say: "This case is also distinguishable from those cases in which towns have been held liable in respect to travelled tracks so left as to mislead the traveller as to which is the lawful public highway."

We call attention to an important modification contained in the opinion in the case of *Smith v. Wendell, supra*. The quotation is as follows: "They are not liable for such obstructions in portions of the highway not a part of the travelled path, *and not so connected with it that they will affect the security or convenience for travel of those using the travelled path.*"

With the qualification contained in that portion of the above opinion italicized, we think the ruling in that case was correct and in harmony with the weight of authority, as we shall hereafter show.

The opinion in the case of *Carolus v. The Mayor, etc., supra*, is so short that we reproduce it entire, as follows: "The intestate came to his death by heedlessly using as a path an embankment of about two or three feet in width, raised by the contractors for regulating the Eighth avenue; never intended, designated, or by any implication used or authorized to be used as a foot path, by the defendants, or

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any one under them. It is shown that the carriage way, which he could have used, was no more than inconvenient; no risk was encountered by pursuing it, which very slight care would not avoid; none, it seems, could occur, except in meeting carriages. It was from nine to twelve feet wide. There were other safe and not inconvenient modes of getting to his house." We are unable to see the application of the above case to the one under consideration.

The facts upon which the ruling in *Rice v. Montpelier*, *supra*, were based are stated to be as follows :

"The plaintiff, it appears, was passing the place in a dark night in November, with a horse and sleigh, and no obstacle existed to passing in the usual track, except want of snow. Snow existed in the ditch, and between that and the made road; and the plaintiff, for no reason apparent, except to get on to the snow, passed along in the ditch, and his horse run into the hole; and hence the damage occurred."

The court say: "It would seem, if this verdict is sustained, that towns must not only be bound to construct good and sufficient roads, of sufficient width, and properly guarded, so as to make travelling safe against all ordinary accidents, but must also put and keep the ditches by the side of the road, usually fitted to conduct water from the road, in an equally practicable condition for travelling; so that, when any one prefers, to obtain snow, or avoid dust, or from any other reason, to travel one side of the road, rather than in it, he may do so under the same security and indemnity as those who travel in the way provided for them. This, we think, would be an unwarrantable extension of the liabilities of towns."

In the above case, the accident occurred upon an ordinary highway in the country, where the same strictness is not required in regard to the margins of the road as is in the streets of towns and cities. We think the ruling was right, but does not sustain the position contended for by appellee.

In the case of *Shepardson v. Colerain*, *supra*, we desire to make an additional quotation from the opinion of the court,

which will more fully and clearly show the ground of the ruling.

The court say: "It was asked by the counsel for the plaintiffs, whether, if the wrought road through the lane had been obstructed by snow, and there had been used, for the public travel through the lane, some other part of the highway, and by reason of some obstruction therein, an injury had been sustained, the party thus injured might not have recovered damages, although travelling without the wrought road appropriated for the summer travel? If he might, it was then inquired, why not here? The cases are by no means parallel. In the case supposed, the path travelled on is, for the time, the made way for travellers passing over the lane; the lane being, throughout its whole length, a public way. The traveller does not leave the ordinary route appropriated for travellers, for the purpose of entering upon a private way. But in the case at bar, there was no such newly appropriated way without the limits of the made way used by the public, for the purpose of continuing their travel upon a public way. The plaintiff left the wrought road, not for the purpose of finding a better road upon the public way, or with a view of continuing to travel upon the highway; but he designedly left the wrought road, for the purpose of continuing his travel upon his private way over his own land. This he might do; but at his peril, if injured thereby, he fully knowing the obstruction upon the lane road before entering upon his journey. The way which is set forth in the declaration as the road out of repair, was found by the jury to have been properly constructed, to have been of proper width for travellers to pass and repass, with proper facilities to turn upon the road, and to have been in all respects such a road that the plaintiff might have travelled with safety, continuing thereon."

In *Howard v. North Bridgewater*, 16 Pick. 189, the court say: "We think it clear that this provision does not mean that the whole of the road, from one boundary to the other, shall be made smooth. In many cases all the property of the

town would be insufficient for that purpose. There may be ledges of rocks, ravines, and water-courses in the road. It cannot be expected that towns shall, in all cases, make bridges the whole width of the road, or fill up ravines, or cut down ledges of rock. But there may be such obstructions out of the travelled path, as will render the road unsafe; such, for instance, as would frighten horses."

We have examined all the cases relied upon by counsel for appellee, and are quite clear that they do not support the doctrine contended for by them.

We have made a careful examination of many authorities, other than those cited by counsel for appellee, and make extracts from a few of them.

In Angell Highways, page 303, sec. 262, the law is stated as follows: "It is, moreover, no justification for a defect or obstruction that it is without the travelled path, if from its nature or position it is dangerous to such as use the road.

"Thus, in *Cobb v. Standish*, in an action for the loss of a horse, in a deep mud hole, filled with water, partly within and partly without the limits of the located highway, and which, to the common observer, had the appearance of being a convenient watering place for horses, WESTON, C. J., remarked: 'Towns are not obliged to furnish watering places for the public convenience, but when they are provided by nature in the highway, they ought not to be suffered to become pitfalls, first to allure and then to destroy horses or other animals turned aside to partake the refreshment to which they are thus invited.' And if a road pass over a bank or bridge, or along the verge of a precipice, it is the duty of the town properly to guard the edge of the road by walls or railings."

In *Sparhawk v. City of Salem*, 1 Allen, 30, CHAPMAN, J., says: "But none of the cases cited sanction the doctrine that railings are necessary merely to prevent travellers from straying out of the highway, when there is no unsafe place immediately contiguous to the way. On the contrary, these cases require the party to show that the defect which caused the

injury existed either in the highway, or so immediately contiguous to it as to make it dangerous to travel on the highway itself."

In *Alger v. City of Lowell*, 3 Allen, 402, HOAR, J., says: "The true test, on the contrary, is not whether the dangerous place is outside of the way, or whether some small strip of ground not included in the way must be traversed in reaching the danger, but whether there is such a risk of a traveller, using ordinary care, in passing along the street, being thrown or falling into the dangerous place, that a railing is requisite to make the way itself safe and convenient."

It was held in *Murphy v. Gloucester*, 105 Mass. 470, that "as a part of this obligation, they are bound to erect suitable railings, or other barriers, where a dangerous place exists in such close proximity to the highway as to render the use of the highway for purposes of travel unsafe. But they are not obliged to erect barriers to prevent or warn travellers from straying from the highway, where there is no dangerous place within such close proximity."

Inasmuch as the opinion in *Davis v. Hill*, 41 N. H. 329, is very much in point and ably reviews several other cases having a strong bearing upon the question under consideration, we make an extended quotation therefrom.

The court say: "It seems entirely clear, upon the authorities, that the want of a sufficient railing, barrier, and protection, to prevent travellers passing upon a highway from running into some dangerous excavation or pond, or against a wall, stones, or other dangerous obstruction, without the limits of the road but in the general direction of the travel thereon, may properly be alleged as a defect in the highway itself. *Willey v. Portsmouth*, 35 N. H. 303; *Coggswell v. Lexington*, 4 Cush. 307; *Hayden v. Attleborough*, 7 Gray, 338; *Jones v. Waltham*, 4 Cush. 299; *Palmer v. Andover*, 2 Cush. 600.

"In *Palmer v. Andover* the alleged defect in the highway was the want of a railing between the highway and an

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embankment existing against a mill-pond, at an angle of the road as it passed down the hill. It appeared that in descending the hill, before reaching this point, at a part of the road entirely free from defect, the horses became detached from the plaintiff's carriage by the purely accidental coming off, without the plaintiff's fault or negligence, of the nut of a bolt, which attached the pole with the traces and other harness of the horses thereto; that thereupon the horses, so detached from the carriage, following the road, turned to the right and passed safely over the bridge, while the carriage kept nearly straight forward, passing to the left of the travelled way, and thence over the embankment into the mill-pond. The court decided that the defendants were liable for the injury thus resulting, if a rail or other barrier were, in the judgment of the jury, necessary for the proper security of travellers, and would have prevented the happening of the accident.

"In *Coggswell v. Lexington* it was holden, that the defendants were liable for an injury happening to a traveller, while in the exercise of ordinary care, in consequence of driving his wagon against a post which stood without the limits of the highway, but near the line thereof, and within the general course and direction of the travel thereon, and rendered the travelling dangerous.

"In *Jones v. Waltham* it was substantially decided, that, if there were dangerous pits, excavations, precipices, walls, stones, or other obstructions, situated without the limits of the located highway, but so near it and so situated that they would, without barriers or guards, endanger the safety of passengers using the travelled or made part of the road, with ordinary care and diligence to avoid exposure to injury, it was the duty of the town to guard against such pits, excavations, precipices, walls, stones, and other obstructions, by means of a railing, or in some other proper mode; and, if they neglected to do so, and in consequence of such neglect any person using the

road sustained an injury, the town would be liable for the damage suffered.

"In *Hayden v. Attleborough*, where the plaintiff sued for an injury occasioned by her driving, in the evening, into a cellar beyond the limits of a highway, the court held, sustaining fully the instructions of the judge at *nisi prius*, that, where the limits of a highway are not indicated by any visible objects, and there is nothing to show a person, driving thereon in the evening, that the course he is pursuing is not within the way intended for the public travel, the town is liable for an accident to a traveller resulting from a defect within the general course and direction of the travel over the highway, although beyond the limits of the located way, if so near thereto as to render the travelling thereon dangerous, and there is nothing to give travellers notice of the defect until too late to avoid it."

No formal act of dedication to the public use of a street or sidewalk is required on the part of the municipal authorities. When a street has been so improved, or a sidewalk so constructed, as to induce a person of ordinary prudence to believe that such street or sidewalk was intended for public travel, the same should be regarded as opened for the public accommodation; and it will make no difference whether the sidewalk was constructed by the corporation or the owners of adjoining property. This rule would not apply where one owner of property on a street had made a pavement along and in front of his property. There should be such length and continuity of pavement as to invite the public travel. It was shown that there had existed for many years, a sidewalk on the east side of Jackson street between the public square and Jones' hotel; that Jones, with the knowledge and tacit consent of the authorities of the city, had constructed his pavement on the grade established by the city, and that the city had afterward extended the culvert some twenty feet. We are of the opinion that the sidewalk from the public square to the south end of Jones' pavement should be regarded as having been opened for the public accommoda-

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tion, and that it had become the absolute duty of the city to keep it in repair and safe for public travel.

It is abundantly established by the authorities heretofore cited, that if there are dangerous pits, excavations, precipices, walls, stones, or other obstructions, situated without the limits of the located highway or travelled track, but so near to it and so situated that they would, without barriers or guards, endanger the safety of passengers using the travelled or made part of the road, with ordinary care and diligence to avoid exposure to injury, it is the duty of the city or town to guard against such defects or obstructions by means of a railing, or in some other proper mode; and if such city or town neglects to do so, and in consequence of such neglect any person using the road sustains an injury, such city or town will be liable.

It is equally as well settled that, where the limits of a highway are not indicated by any visible objects, and there is nothing to show a person driving, riding, or walking thereon, that the course he is pursuing is not within the way intended for the public travel, a city or town is liable for an accident to such person, resulting from a defect or obstruction within the general course and direction of the travel over the highway, although beyond the limits of the located highway or travelled track, if so near thereto as to render the travelling thereon dangerous, the person receiving the injury having used ordinary care and diligence to avoid injury. It is quite obvious that the case was not tried in the court below according to the principles of law herein enunciated, and that there must be a new trial.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to grant a new trial and sustain the demurrer to second and fourth paragraphs of the answer, and for further proceedings in accordance with this opinion.

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ACTION.

Relief from Forged Instrument.—One whose name has been forged to a negotiable instrument may maintain an action against an indorsee of such instrument, to compel a surrender of such forged instrument, or a release from liability thereon; and in such action, the court may render a judgment releasing the person whose name is forged from all liability, and as to him declaring the instrument null and void.

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ALTERATION OF INSTRUMENT.

See PRINCIPAL AND SURETY, 7.

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APPEAL.

See HUSBAND AND WIFE, 4; LIQUOR LAW, 1; SUPREME COURT.

1. ***From Justice of the Peace.—Appeal by each Party.***—Where a cause is appealed from a justice of the peace by each party, only one transcript is necessary, and only one cause should be docketed in the appellate court.

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2. ***Same.***—If the appeal of each party is not taken at the same time, to complete the transcript, it will only be necessary for the justice of the peace to certify the entry relating to the second appeal and file the appeal bond. *Ib.*

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1. ***Common Law Arbitration.***—Where in a common law arbitration the submission is to three, and there is no agreement that two may act and render an award, all three of the arbitrators must meet, hear the proofs, and sign the award, to render such award valid. *Baker v. Farmbrough et al.*, 240

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3. ***Answer.***—Where it was shown by the submission to arbitration that the partnership goods of the parties went into the hands of one party, after the

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ARREST.

1. *City Marshal.—Power to Make Arrest.*—A city marshal, under the act of 1867 (3 Ind. Stat. 75, sec. 29), has authority to arrest, without process, any person that within his view shall commit any crime or misdemeanor, or violate any ordinance of the city, and detain such person in custody until the cause of the arrest can be investigated. If the court having jurisdiction of the offence be not in open session, he may confine the person arrested in the city prison or county jail, until he can be brought before the court; and this shall be done at the earliest period. *Boas et al. v. Tate*, 60
2. *Same.*—The right of a city marshal to arrest and imprison in the county jail carries with it the right, on the part of the jailer, to receive and detain the prisoner. *Ib.*
3. *Same.—Statute Construed.—Power to Receive Pledge for Appearance.*—Sections 38 and 40, 2 G. & H. 397, relate only to arrests made under warrants issued from courts of record, and do not authorize a city marshal or policeman, who has made an arrest on view, to accept of property or money as a pledge or security for the appearance of the person arrested to answer the charge. *Ib.*
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5. *City Marshal.—Jailer.*—If a city marshal or police officer, having authority to make an arrest on view and to commit the prisoner to jail until such time as he can be brought before the proper authority, make an arrest and take the prisoner to a jail with the declaration that he has been arrested for an offence committed on view, that declaration stands in the place of a mittimus in other cases, and the jailer should receive the prisoner without regard to the question of his guilt or innocence. *Ib.*
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nte, a party acting as special constable has no authority to act and cannot justify under the writ. *Dietrichs et al. v. Schaw*, 175

9. *Same.—Citizen Acting under Officer.*—A citizen acting under such person cannot justify. It may be that where a known public officer calls upon a citizen to aid him in the execution of process, the citizen can justify under the officer, although the officer himself be guilty of a trespass; but where the party making the arrest is not a known public officer, but only assumes to act in the particular case by special appointment, persons aiding the supposed officer are bound to know whether he is authorized to make the arrest or not; and if in such case the party making the arrest is a trespasser for want of authority, those aiding him are also trespassers. *Ib.*
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1. *Garnishee.*—A payment by a garnishee to a justice of the peace who had jurisdiction of the subject and the parties in an attachment proceeding, is a defence to a suit by the attachment defendant against such garnishee for the same debt, although such attachment proceeding as between the creditor and debtor was irregular and reversible. *The O. & M. R. W. Co. v. Alvey*, 180
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3. *Same.*—Where the defendant in attachment is not personally before the court, the garnishee is required to examine and know that the court has jurisdiction of the subject of the action. *Ib.*
4. *Liability on Bond.*—The statute does not require, in order to give the defendant in an attachment proceeding an action on the undertaking, that there should have been an issue made on the affidavit and a finding in favor of the defendant thereon. *Harper et al. v. Keys*, 220
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See ATTACHMENT, 7, 8; EVIDENCE, 1, 2, 3, 7.

BAIL.

See REPLEVIN BAIL.

BANKRUPTCY.

See PARTIES.

BILL OF EXCEPTIONS.

See PRACTICE, 3, 5, 7; SUPREME COURT, 13, 14, 18; TIME.

1. *Time of Filing.*—Where sixty days were given within which to file a bill of exceptions, and the bill was signed by the judge within that time, and, though it was copied into the record, it did not appear by any statement in the body of the record that it was ever filed, but the certificate of the clerk of the court below, given within the sixty days, stated that the record was a full, true, and complete transcript of all the proceedings had in the case, as the same appeared of record, and of papers on file in his office.

Held, that it affirmatively appeared that the bill of exceptions was filed prior to the date of the certificate and within the time allowed by the court.

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2. *Same.*—A bill of exceptions filed after the expiration of the time given within which to file the same does not become a part of the record.

Stone v. McKinney et ux., 351

3. *Evidence.*—The action of a court in ruling upon a motion for a new trial, for reasons relating to evidence improperly admitted or rejected, newly-discovered evidence, or the weight and legal effect of evidence, is not properly presented for review unless the evidence is in the record by a bill of exceptions.

Jewett et al. v. Pleak et al., 368

4. *Same.*—Where time has been given, beyond the term, for filing a bill of exceptions, the transcript must affirmatively show that it was filed within the time limited.

Wiggs v. Koontz, 430

5. *Time of Filing.*—Where ninety days were given in which to file a bill of exceptions, and it was not shown when the bill was filed;

Held, that it was not properly in the record.

The City of Terre Haute v. Ripley, 508

6. *Same.*—Where no time has been asked or given at the time of the making of a decision, within which to file a bill of exceptions, a bill filed at a subsequent term, at the time of the rendition of judgment, does not become a part of the record.

Ruston v. Biddle, 515

BOND.

See ATTACHMENT, 4, 5, 6, 7; REPLEVIN BAIL, 2; SHERIFF, 4.

BRIEF.

See SUPREME COURT, 10, 11.

CASES OVERRULED, CRITICISED, EXPLAINED, OR DOUBTED.

1. *Statute of Frauds.—Part Performance.*—*Eastburn v. Wheeler*, 23 Ind. 305, overruled.

Sands v. Thompson, 18

2. *Principal and Surety.*—*Notice.*—Kaufman v. Wilson, 29 Ind. 504, criticised.
Fensler v. Prather, 119
3. *Arbitration and Award.*—Kile v. Chapin, 9 Ind. 150, explained and criticised.
Baker v. Farmbrough et al., 240
4. *Corporation.*—*Articles of Association.*—Eakright v. The Logansport and Northern Indiana R. R. Co., 13 Ind. 404, criticised.
Busenback v. The Attica and Bethel Gravel Road Co., 265
5. *Chattel Mortgage.*—*Registry.*—McCord v. Cooper, 30 Ind. 9, overruled.
Duke v. Strickland, 494
6. *Draining Association.*—*Articles of Association.*—Seyberger v. The Calumet Draining Co., 33 Ind. 330, doubted.
The Newton Co. Draining Co. et al. v. Nofsinger et al., 566

CHATTEL MORTGAGE.

See MORTGAGE, 2 to 7.

CIRCUIT COURT.

See COUNTY CLERK.

CITY.

See RAILROAD, II.

Marshal. See ARREST, I to 5.

Jailer. See ARREST, 6.

Police Officer. See ARREST, 7.

1. *Sewer.*—*Common Council.*—The question of benefits to property in a city from the construction of a sewer having once been passed upon by the common council, no other court or tribunal has any power to review or pass upon it. The legislature has granted the sole power to try and decide that question to the common council, which acts judicially, and when it has determined by its estimate and assessment what property is benefited and in what proportion, that decision is final and complete, and there is no power in any judicial tribunal to interfere, unless for fraud and corruption in making the assessment. *The City of Ft. Wayne v. Cody*, 197
2. *Liability for Street Improvement.*—Where a city organized and acting under our general law makes a contract for the improvement of a street at the expense of the property holders, and the contractor does the work in whole or in part, and the engineer refuses to make an estimate, and the council refuses to issue precepts upon the proper application against the property holders, a suit cannot be maintained by the contractor against the city for damages. *The City of Greencastle v. Allen*, 347
3. *Same.*—*Mandate.*—The remedy in such case is by mandate to compel the engineer and council to perform their duties. *Ib.*
4. *Contract.*—*How Made or Annulled.*—*Common Council.*—The common council of a city can only contract by an order, resolution, or ordinance, passed in the manner required by statute; and when a contract has been thus made, it can be repealed or annulled only by a vote of the council.
The City of Terre Haute v. Lake, 480
5. *Same.*—*Pleading.*—A complaint upon a cause of action based upon the making and annulling of a contract by a city must contain a copy of the orders of the common council in making and annulling the contract. *Ib.*
6. *Liability for Defect in Sidewalk.*—Where a city improved one sidewalk and the roadway of a street, but did not improve the opposite sidewalk, and a lot owner on the side unimproved made a sidewalk in front of his property, under the direction, as to the grade thereof, of the civil engineer of the city (being a continuation of a sidewalk which had been used by

the public for several years), which he so constructed that it terminated in an abrupt descent, over which a foot passenger fell and injured himself in the night-time;

Held, that the city was liable for the injury, in the absence of negligence of the injured party, the city having notice of the dangerous character of the sidewalk, notwithstanding such sidewalk had been so constructed without authority from the city. *Higert v. The City of Greencastle*, 574

COMMON CARRIER.

1. *Place of Delivery.—Custom.*—Where it is alleged in a complaint against a railroad company on a contract of shipment, and proved on the trial, that it has been the custom of the railroad company to deliver cars loaded with lumber for the plaintiff, at or near the plaintiff's place of business, it is to be presumed that the contract of shipment was made with reference to such custom or usage, and that the railroad company was bound to deliver the cars at the usual place.

The P., C., & St. Louis R. W. Co. v. Nash et al., 423

2. *Same.*—The liability of a common carrier in the shipment of lumber, coal, or the like, will terminate, in the absence of a contract providing otherwise, when the car containing the same is placed where such articles are usually unloaded, or when the car is delivered at some safe and convenient place designated by the consignee, and notice of such delivery has been given. *Id.*

3. *Same.—Liability for Lumber Destroyed by Fire.*—Where the local agent of a railroad company carrying lumber recognizes the obligation of the company to run the cars to the usual place of delivery, and agrees so to do, but, before the agreement has been carried out, the lumber is destroyed by fire, the company is liable. *Id.*

CONDITION PRECEDENT.

See INSURANCE, 1; PLEADING, 6, 7, 8.

CONSIDERATION.

See CONTRACT, 2, 3, 4; PARTNERSHIP, 1; PROMISSORY NOTE, 3; VENDOR AND PURCHASER, 3.

CONSPIRACY.

Liability of Conspirators for Acts of Each Other.—If there is a conspiracy of two or more to commit a tort, each one engaged in the conspiracy is liable for the acts of the other done in pursuance of the conspiracy. So each is liable for the acts in which he participates. *Boaz et al. v. Tate*, 60

CONSTABLE.

See ARREST, 8; REPLEVIN BAIL, 2.

CONSTITUTIONAL LAW.

See PRIVATE ROAD, 3.

Patent.—Statute.—Promissory Note.—The statute (3 Ind. Stat. 364) providing, that any person who may take any obligation in writing, for which a patent right, or right claimed to be such, shall form the whole or any part of the consideration, shall, before it is signed by the maker, insert in the body of the obligation above the signature the words "given for a patent right," is unconstitutional and void, being in conflict with sec. 8, art. 1, of the constitution of the United States, which, from the nature and subjects of the power necessarily to be exercised, confers on Congress the exclusive power "to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors the exclusive right to their respective writings and discoveries." *Helm v. The First National Bank*, 167.

CONTRACT.

See CITY, 4.

1. *Novation*.—If A. takes the note of B. for the debt of C., it is an extinguishment of the debt of C., if so agreed by the parties.

Jewett et. al. v. Pleak et al., 368

2. *Consideration*.—The makers of a promissory note mortgaged their personal property to a third person to secure to such person a debt due from the mortgagors, and the mortgagee was placed in possession of the mortgaged property, and was selling the same, to make the amount due, under a power of sale contained in the mortgage, and while so engaged he agreed with the holder of the note made by the mortgagors that if he could save enough out of the mortgaged goods to pay his own debt and the amount of the note, he would pay the note, and as evidence of the agreement he placed his name on the note.

Held, that if he failed to realize enough from the sale of the goods to satisfy his own debt, he could not be held liable on the note, there being no consideration to support the execution of the note. *Starr v. Earle et al.*, 478

3. *Same*.—To constitute a valid consideration, there must be some benefit to the promisor, or to a third person, or some loss or inconvenience to the promisee. *Ib.*

4. *Same*.—A mere naked promise to pay the already existing debt of another, though in writing, if without a new consideration, is void. *Ib.*

CONTRIBUTION.

See PRINCIPAL AND SURETY, 2.

CONVEYANCE.

- A paper purporting to be a deed of conveyance which contains no words of conveyance, and fails to name any grantee, does not show the conveyance of any title.

Davis et ux. v. Davis et al., 561

CORPORATION.

See CITY; DRAINING ASSOCIATION; RAILROAD; TURNPIKE.

1. *Pleading*.—The allegation, in a complaint, that the defendant is a common carrier doing business under the style and firm name of The Adams Express Company, implies that the defendant is a corporation, and not a copartnership.

The Adams Ex. Co. v. Hill, 157

2. *Same*.—*General Denial*.—*Evidence*.—Where an action is brought against a defendant by a name implying a corporation, and in that name such defendant forms an issue by general denial and goes to trial, it is not necessary for the plaintiff to introduce any evidence of the existence of the corporation. *Ib.*

3. *Liability for Acts of Agents*.—A corporation is liable for the wilful acts and torts of its agents committed within the general scope of their employment, as well as acts of negligence; and the corporation is thus bound, although the particular acts have not been previously authorized or subsequently ratified by the corporation. The act of the agent within the general scope of his employment is the act of the master, and if wrongful, the master is liable, although the act be unnecessary to the performance of the master's service, and was not intended for that purpose. The liability of the master does not depend upon the necessity of the act or the intent with which it was done, but upon whether the act was wrongful and within the general scope of the employment of the agent.

The I., P., & C. R. W. Co. v. Anthony, 183

4. *Information*.—An information against a corporation in its corporate name, charging that it has not been legally organized, and pointing out certain

supposed defects in its organization, and praying for the dissolution of its franchises, is bad for not being against certain persons claiming to be a corporation. It cannot be brought into court as a corporation to answer an allegation that it is not and never was a corporation. When a corporation is brought into court by its corporate name, its existence as such is admitted.

The Mud Creek Draining Co. v. The State, ex rel. Marley et al., 236

5. *Injunction.—Illegal Corporation.*—A party who is about to be damaged by the act of a company assuming to act as a corporation, but never legally organized as such, may bring his action for an injunction against such company in the corporate name.

The Newton Co. Draining Co. et al. v. Nofsinger et al., 566

COSTS.

See SUPERIOR COURT.

COUNTY CLERK.

Allowance for Attendance in Court.—A circuit court has no legal power to make an allowance to the clerk for his daily attendance in court during the year 1870; and if such allowance has been made, the auditor is not bound to issue a warrant therefor. *Rudisill v. Edsall*, 377

COURT.

Power over record. See RECORD.

COURT OF COMMON PLEAS.

See JURISDICTION, 4, 5.

CRIMINAL LAW.

1. *Conviction after Repeal of Law.*—The act of February 27th, 1873 (Acts 1873, p. 151), to regulate the sale of intoxicating liquors, contains no provision saving prosecutions pending at the time of its passage, and as it repealed all laws in conflict with any of its provisions, a judgment rendered in such an action for a violation of the previous law is without foundation, even if rendered on a plea of guilty. *Whitehurst v. The State*, 473
2. *Indictment.—Obtaining Money by False Pretences.*—An indictment for obtaining money by false pretences, under section 27, 2 G. & H. 445, must allege whose money was obtained. *Halley v. The State*, 509
3. *Venue.*—Upon the trial of a criminal action, the evidence must show in what county and state the offence was committed. *Mullinix v. The State*, 511
4. *Repeal of Law.*—Where, at the time of the reversal by the Supreme Court of a judgment in a criminal action, the violated law has been repealed without the saving of pending actions, the defendant cannot be again put upon trial. *Ib.*

CUSTOM.

See COMMON CARRIER, 1.

DAMAGES.

[See ATTACHMENT, 7, 8; TRESPASS, 2; TURNPIKE, 2, 3.]

1. *Defence.*—In an action for an injury to a drain leading from the plaintiff's cellar, the fact that the drain imperfectly accomplished the uses for which it was constructed cannot justify the injury to it; nor may such injury be justified by a license from a third party on whose land the drain is in part constructed. *The O. & M. R. W. Co. v. Hemberger*, 462
2. *Notice of Injury.*—It is not necessary that one whose cellar drain has been

injured should give notice of the injury to the party that committed the injury before commencing suit to recover damages. *Ib.*

DECEDENTS' ESTATES.

See WITNESS.

1. *Claim.—Heirs.*—A person who, not being excused by any statutory disability, fails to file his claim against a decedent's estate before final settlement, although such claim at the date of such settlement be not due, is barred of any right of action against the heirs of such estate, although they have inherited property from the decedent.
The C., R., & Ft. W. R. R. Co. v. Heaston et al., 172
2. *Executor and Administrator.—Promissory Note.—Assignment.*—If an administrator of an estate barter promissory notes of the estate and assign them for goods for his own use, it is a waste of the assets of the estate; and, if the assignee have knowledge, even from the nature of the transaction, that the administrator is thus acting in violation of his trust, the right of property in the notes is not divested, and he cannot hold the notes or profit by such purchase as against those rightfully entitled to them.
Thomasson, Adm'r, v. Brown et al., 203
3. *Same.*—It seems that, as our statute (2 G. & H. 528, sec. 159) authorizes a foreign executor or administrator to sue in the courts of this State, the bringing of evidences of debt by him to this State, from the foreign state in which administration has been granted, can not work a forfeiture of his title. *Ib.*
4. *Claim.—Pleading.*—No formal complaint is necessary in prosecuting a claim against the estate of a decedent; a succinct statement of the nature and amount of the claim is all that the statute requires. A statement of an account which would be a good cause of action against a living defendant before a justice of the peace is a sufficient statement of a claim against a decedent's estate.
Ginn, Ex'r, v. Collins, 271
5. *Evidence.*—As a general rule, a party may introduce his evidence in the order which he prefers; therefore, on the trial of a proceeding to enforce a claim against a decedent's estate, it was not error to admit evidence of the value of personal services rendered by the plaintiff to the decedent (his father), before any proof was given of an express promise by the decedent to pay for such services. *Ib.*
6. *Witness.—Executor.*—On the trial of a claim for services rendered to a decedent in his lifetime, the personal representative cannot testify as a witness, unless called as such by the opposing party or by the court. *Ib.*

DEFAULT.

See PRACTICE, II.

DEMAND.

See VENDOR AND PURCHASER, 2.

1. *Waiver.*—Where a demand is necessary before bringing suit, if, when a demand is made, a specific objection is made as a reason for not complying with the demand, all other objections, which if made might be readily obviated, are waived.
Bartlett v. Adams, 447
2. *Same.—Partition Fence.*—Where a defendant had enclosed his theretofore unenclosed land, and by so doing a fence owned by the plaintiff became a partition fence, and the plaintiff thereafter called upon the defendant and demanded pay for one-half of the value of such partition fence, and the defendant did not object that the value had not been estimated, but denied his liability and stated that he would pay no amount whatever, such refusal waived an estimate of the value as a prerequisite to the maintenance of an action. *Ib.*

DEMURRER.

See NEW TRIAL, 1, 2, 4, 5; PLEADING, 11; PRACTICE, 5, 9; SUPREME COURT, 9, 21.

1. *Form of Demurrer.—Joint and Several Demurrer.*—A demurrer was filed to a reply, in the following language: "Now come the defendants in the above cause and demur to the second, third, and fourth paragraphs of plaintiff's reply to defendants' answer, upon the following grounds: 1st. Said second paragraph does not state facts sufficient to constitute a defence to said answer, or to enable said plaintiff to recover; 2d. Said third paragraph does not state facts sufficient to constitute," etc. (the same as the first, and as to the fourth paragraph the same).

Held, that the demurrer was good, and raised the question as to the sufficiency of the facts stated in the reply.

Held, also, that the demurrer was joint, and not several.

Silvers v. The Junction R. R. Co. et al., 435

2. *Same.*—To make a demurrer several, it is not necessary that it should be addressed in terms to each paragraph of the pleading to which it is filed. The use of the words *severally* and *each* will cause a demurrer to be treated as several. For proper forms of demurrer, see opinion. *Id.*

DEPOSITION.

See EVIDENCE, 9, 10.

DRAINING ASSOCIATION.

1. *Variance.*—Where the articles of association of a corporation gave the corporate name as "The Arctic Ditchers," and the assessment of benefits was made in the name of "The Arctic Ditchers' Association," the variance was not fatal to the assessment on appeal. *Chase v. The Arctic Ditchers*, 74
2. *Filing Assessment.*—From the date of the filing of the assessment in the recorder's office it is a lien on the lands assessed, without regard to the date at which it is recorded. *Id.*
3. *Filing Articles.*—The filing of the articles of association in the recorder's office fixes the date at which a company becomes a corporation. *Id.*
4. *Articles of Association.*—The law authorizing the organization of associations for the purpose of draining wet lands (Acts Special Session, 1869, p. 82, 3 Ind. Stat. 222) contemplated that the mode and manner of draining should be described and particularly specified in the articles of association of a draining company; and without this they are fatally defective, and any assessment made thereunder upon lands for benefits thereto is illegal, and the collection may be enjoined.

The Skelton Creek Draining Co. v. Mauck, 300

5. *Same.—Description of Land, and Proposed Improvement.*—Where articles of association of a draining company provide that the jurisdiction of the company shall include four townships in a county, and shall have reference to all the wet and overflowed lands in said townships, particularly the lands of certain designated persons, a schedule of whose lands is appended to the articles, and say that the object of the association shall be the draining and ditching of the lands aforesaid, and it is proposed therein to construct divers ditches, etc., without defining the routes of the same, the articles do not sufficiently specify the contemplated improvements or the lands to be affected thereby.

The Newton Co. Draining Co. et al. v. Nofsinger et al., 506

6. *Same.*—Where there is no legal incorporation of a draining association, owners of lands assessed are not estopped from resisting the collection of the assessments because a part of the contemplated ditching has been completed at great expense, thus benefiting the lands of such owners, with their knowledge and without objection. *Id.*

EMINENT DOMAIN.

See PRIVATE ROAD, 3.

ESTOPPEL.

See WILL, 5.

EVIDENCE.

See CORPORATION, 2; DECEDENTS' ESTATES, 5; FALSE IMPRISONMENT, 7; JUDGMENT, 1, 2, 3; JUSTICE OF THE PEACE; MALICIOUS PROSECUTION, 2, 5; MORTGAGE, 6; PRACTICE, 4; PROMISSORY NOTE, 2; RAILROAD, 12; SEDUCTION; SUPREME COURT, 4, 7, 8, 14, 15, 18.

1. *Confidential Communications.—Attorney and Client.*—A party, having given evidence in chief in his own behalf, cannot, on cross-examination, be compelled to divulge statements made by him when consulting, as a client, an attorney at law. *Bigler v. Reyher*, 112
2. *Same.*—Communications made in consultation by a client to his attorney are privileged and protected from inquiry, when the client is a witness, as well as when the attorney is a witness. *Ib.*
3. *Same.*—Statements made by a client to his legal adviser are privileged, though no action is at the time pending or contemplated concerning the matter of which such statements are made. *Ib.*
4. *Witness.—Impeachment of.*—Where witnesses testified, on examination in chief, that the general character of a party for truth, veracity, and honesty was good, it was incompetent to ask them, on cross-examination, if they had heard certain of his neighbors say that the sheriff of a certain county had come to arrest him for larceny on a warrant issued on an indictment found against him in that county. *Oliver v. Pate*, 132
5. *Jury.*—A jury must consider all evidence introduced, decided to be admissible by the court. *Ib.*
6. *Same.*—A jury have the right to disregard the evidence of a witness, in whole or in part, if they deem him unworthy, although his character for truth and veracity may not have been directly impeached, though they ought not to do so wantonly, without evidence or cause. *Ib.*
7. *Confidential Communications.—Attorney and Client.—Prosecuting Attorney.—Waiver.*—Communications made to a prosecuting attorney relative to criminals or suspected persons are privileged, and cannot be divulged without the consent of the person making them. The immunity from disclosure of communications so made is a privilege personal to the one making them, which is not waived by his voluntarily testifying generally, in an action against him for malicious prosecution, in his own behalf, but is waived, if, being a witness in his own behalf, he voluntarily discloses what statements he made to the prosecuting attorney, who then may testify in relation to the communication. *Ib.*
8. *Railroad.*—In a trial for damages for the alleged wrongful ejectment of a passenger from a railway train, it is competent for a witness who was present to state what he heard said on the occasion of such expulsion, leaving it to others to identify the persons who made the statements. *The I., P., & C. R. W. Co. v. Anthony*, 183
9. *Deposition.—Motion to Suppress.*—A court should not sustain a motion to suppress the whole or a part of a deposition, if it would be admissible in rebuttal, although not admissible in the first instance. *Ib.*
10. *Impeachment of Witness.*—In a deposition to impeach a witness, to the question, "Is that character good or bad?" the answer was, "It is bad anywhere, and always was; I would not believe him on oath." A motion to strike out all of this answer but the words, "It is bad," should have been sustained. *Ib.*

11. *Same.*—When a female has testified to certain indecent conduct toward herself, evidence relating to her general character for truth, veracity, and chastity is admissible, to impeach her. *Id.*
12. *Railroad.—Ejection of Passenger.*—It is competent for a party who has been forcibly ejected from a railway train, in a suit for damages for such ejection, to prove what was the state of his health and the condition of his clothing shortly after his expulsion from the train, as tending to show the character of the treatment he received from the employees of the road and the danger to which he was subjected by reason of his sickness and exposure; but his own statements to a witness as to such condition of his clothing and what caused it are not admissible. *Id.*
13. *Harmless Error.*—Although evidence has been improperly admitted, the judgment will not for that reason be reversed, if the same facts were clearly and unmistakably proved by other competent testimony. *Id.*
14. *Expert.—Testimony by Comparison of Signatures.*—Where the genuineness of a signature is in dispute, a witness who is an expert may have papers conceded to be genuine placed in his hands, and he may compare the genuine signatures with the one in dispute, and from such comparison state whether or not the disputed signature is genuine or simulated.
Burdick v. Hunt et al., 381
15. *Same.*—Papers not in evidence in the cause, nor admitted to be genuine, cannot be used in making such comparison. *Id.*
16. *Cross-Examination.—Impeachment.*—A witness testifying on the trial of a cause may, for purposes of impeachment, be asked, on cross-examination, whether he did not at a certain time and place testify before the grand jury, and there make statements different from his present testimony. *Id.*
17. *Knowledge of Witness.*—A deputy clerk, having the papers in a cause, may testify as to who was engaged as an attorney in the cause, and the length of time it was on the docket, where it does not appear that he relies on the papers to enable him to so testify. *Aston v. Wallace, 468*

EXECUTOR AND ADMINISTRATOR.

See DECEDENTS' ESTATES, 2, 3; WITNESS.

EXPERT.

See EVIDENCE, 14, 15.

EXPRESS COMPANY.

See CORPORATION, 1.

FALSE IMPRISONMENT.

See MALICIOUS PROSECUTION, 1.

1. If an imprisonment is extra-judicial, without legal process, it is false imprisonment. *Boaz et al. v. Tate, 60*
2. *Malice.*—When an arrest is made upon valid process, issued by a court having jurisdiction, trespass for false imprisonment will not lie, though the arrest be maliciously procured by the prosecutor without probable cause. *Id.*
3. *Same.*—Where the gravamen of an action is the arresting and imprisoning of the plaintiff without legal process, averments in the complaint relative to the malicious purposes of the defendant are only by way of aggravation. *Id.*
4. *Pleading.—Answer.*—Where a complaint for false imprisonment alleges that the plaintiff was imprisoned on more than one charge, an answer justifying the arrest on only one of the charges is bad. *Id.*
5. *Malice.—Probable Cause.*—In an action for false imprisonment, it is not necessary, to entitle the plaintiff to recover, that he should prove malice or want of probable cause. *Id.*

6. *Pleading.—Evidence.*—In an action for false imprisonment, a defence of justification in making the arrest and imprisonment is not available under the general denial. *Ib.*
7. *Malice.—Evidence.*—Where officers having charge of a person under arrest have no authority to fix the bail and take a recognizance, or to receive in pledge any article of value as security for the appearance of the prisoner, their failure to take bail or receive such pledge is no evidence of malice. *Ib.*

FENCE.

See DEMAND, 2; RAILROAD, 2, 3, 4, 11, 12.

FORCIBLE ENTRY AND DETAINER.

See JURISDICTION, 4.

FORGED INSTRUMENT.

Relief from. See ACTION.

FRAUD.

See PLEADING, 1, 2.

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

GARNISHMENT.

See ATTACHMENT, 1, 2, 3.

GRAND JUROR.

May be a Witness.—The oath of grand jurors does not prevent the public or an individual from proving by one of the jurors, in a court of justice, what passed before the grand jury. *Burdick v. Hunt et al.*, 381

GRAND JURY.

See EVIDENCE, 16.

HUSBAND AND WIFE.

See PRINCIPAL AND SURETY, 1; TRUST.

1. *Married Woman.—Contract.*—The promissory note of a married woman is absolutely void. Such note, although given for property purchased for her own use, she having a separate estate and her husband being insolvent, is not evidence of her intention to charge her separate estate with the payment of the debt named in the note. *Hodson et al. v. Davis*, 258
2. *Same.—Intent to Charge Separate Estate.*—The fact that credit for goods sold to a married woman is given upon faith of her separate property, is not sufficient to create a charge against her lands or income; she, also, must contract with regard to her separate property. *Ib.*
3. *Same.—Complaint.—Husband.*—A complaint against husband and wife on a note, alleging that it was executed by both for property sold to the wife, and praying judgment only against the separate property of the wife, presents no cause of action against the husband. *Ib.*
4. *Same.—Appeal.*—In such case the husband, by virtue of the marital relation, may properly join in an appeal from a judgment against the property of the wife. *Ib.*

5. *Contract*.—Where money is loaned to a married woman, her contract to repay it is not voidable merely, but absolutely void; and a promise made by her after the death of her husband to repay it is incapable of having vitality or binding force given to it, without some new and valuable consideration. *Maher v. Martin*, 314
6. *Evidence*.—In an action brought by a husband and wife to recover rent claimed to be due on a written lease made by the husband and wife, it was not error to allow the defendant to testify that he negotiated with the husband when renting the premises, to show the relations of the parties and as tending to establish the agency of the husband for the wife. *Woodward et ux. v. Lindley et al.*, 333
7. *Witness*.—*Lease of Wife's Real Estate*.—Where a lease is executed by a husband and wife, but it is stipulated that the rent is payable to the wife, and the premises are to be surrendered to her, an action for the rent brought in the name of the husband and wife concerns the separate estate of the wife, and the husband has no interest in the action except that he would be liable for costs if the same could not be made out of her property; and in such action the husband is not a competent witness. *Ib.*
8. *Lease*.—*Authority of Husband to Accept Surrender*.—Authority on the part of a husband to receive rent for his wife's premises, and to direct repairs, will not authorize him to accept a surrender of the demised premises. *Ib.*
9. *Same*.—Where the premises of a wife are leased for a term of years, and by the express terms of the lease the surrender of the premises, at the expiration of the lease, by lapse of time or otherwise, is to be to the wife, though the husband may be authorized to accept payment of rent and to direct repairs, handing the keys of the premises to him before the expiration of the term, without stating the purpose of their being handed to him, and his acceptance of them without any agreement that the premises shall be surrendered, or that the lessor may have possession, will not amount to a surrender of the lease and premises. *Ib.*

INJUNCTION.

See CORPORATION, 5; INSOLVENT DEBTOR, 2.

1. *Pleading*.—*Illegal Tax*.—In an action against a county treasurer, to enjoin the collection of a tax alleged to have been illegally assessed by the assessor, the complaint must show that the assessment was placed upon the tax duplicate, that the duplicate is in the hands of the treasurer, and that he is threatening to collect the tax. *Pugh v. Irish*, 415
2. *In what Cases Granted*.—Injunctions are granted to restrain the commission of acts threatened or anticipated, injurious to the plaintiff, pending litigation, and not where the matter complained of has been consummated, either before or after the action is commenced, and before judgment. *McGoldrick et al. v. Slevin et al.*, 522
3. *Disposal of Property by Debtor*.—Where a debtor is in the open and visible possession of property, and it is not shown that there has been a fraudulent disposition of any of the property, or that the debtor threatens so to dispose of it, there is no cause to restrain the debtor from selling or disposing of the property. *Ib.*

INSANITY.

See REAL PROPERTY, ACTION TO RECOVER, 1, 2.

INSOLVENT DEBTOR.

See INJUNCTION, 3.

1. *Judgment Against*.—An insolvent debtor contemplating an assignment may enter an appearance to a complaint and allow judgment to go, on

proof, for a just debt; upon which an execution may issue, under and by virtue of which the goods of the debtor may be seized and sold.

McGoldrick et al. v. Slevin et al., 522

2. *Judgment Creditors of Insolvent Debtor.*—Such judgment creditors have liens prior and paramount to the claims of other creditors who have no judgments, and are entitled to have their judgments paid in full, and cannot, on the application of other creditors, be enjoined from collecting their judgments. *Ib.*
3. *Same.*—Such other creditors cannot, on their application, have a receiver appointed to take possession of and sell the property of the judgment debtor, where it is not shown that there is danger of the judgment debtor's fraudulently disposing of his property. *Ib.*

INSTRUCTIONS TO JURY.

1. It is the duty of a party who desires a particular charge to prepare it and ask that it be given to the jury, and if he fails to do so, and the court omits to charge on the subject, he cannot complain. *Burgett v. Burgett*, 78
2. *Supreme Court.*—In placing a construction upon instructions complained of, this court will look at all the instructions given on the same subject; and if the instructions taken together present the law correctly, and are not calculated to mislead the jury, the judgment will not be reversed thereon. *Kirland v. The State*, 146
3. *Same.—When Inconsistent.*—If two charges are inconsistent with each other, if they were calculated to confuse and mislead the jury, or if they must have left the jury in doubt or uncertainty as to the law applicable to the facts of the case, then the judgment should be reversed. *Ib.*
4. *Same.—Assault and Battery.*—In a prosecution for assault and battery, the court instructed the jury, that if, under certain circumstances mentioned in the charge, "the defendant struck or beat the prosecuting witness while he was gathering corn in the field; or, while he was driving his team in the field, in the act of gathering corn, the defendant struck and beat the horses of the prosecuting witness in a rude and angry manner with a stick, the defendant is guilty of an assault and battery."
Held, that, as there was evidence tending to prove that the defendant did strike the horses when being driven, the instruction was calculated to mislead the jury to the conclusion that such striking the horses was an assault and battery upon the driver, which it was not in any legal or logical sense, the driver himself not having been touched directly or indirectly; and hence such instruction was erroneous. *Ib.*
5. *Fulness of.*—Where instructions state the law correctly, though they might have been fuller, they are not for that cause erroneous. *Carpenter v. The State*, 371
6. *Applicable to Facts Assumed to be Proved.*—Where evidence is offered by either party, to prove a certain state of facts, and the claim is made that they are proved, and the court is requested to charge the jury what the law is, as applicable to them, and what verdict to render if they find them proved, the court must comply with the request. *Ib.*
7. *Instructions Given Substantially as Requested.*—It is not error to refuse an instruction asked by a party, where the court of its own motion gives an instruction substantially the same as the one asked. *The O. & M. R. W. Co. v. Hemberger*, 462
8. *Applicable to Evidence.*—It is not error to refuse an instruction which is not applicable to the evidence. *Ib.*

INSURANCE.

1. *Pleading.—Condition Precedent.*—Where the terms of an insurance policy provide, that before a loss shall be payable, the insured shall produce to the

company sworn statements of the loss and other matters, together with a certificate of a disinterested magistrate respecting the loss; in an action upon the policy, the complaint must show that these conditions precedent have been performed. And in pleading such performance, it is not sufficient to allege, that, "though proof of said loss has been duly made and notice given, yet said defendant has not made good the loss."

The Home Ins. Co. of N. Y. v. Duke, 418

2. *Certificate of Magistrate*.—Where an insurance policy provides that before a loss shall be payable, the certificate of the nearest disinterested magistrate shall be filed with the company, no recovery can be had on such policy until such certificate is produced. *Id.*

INTEREST.

See PRINCIPAL AND SURETY, 8, 9.

INTERROGATORIES TO JURY.

See PRACTICE, 14, 16, 17.

JOINT CONTRACT.

See PARTIES; WITNESS.

JUDGMENT.

See ACTION, 1; JURISDICTION, 1, 2; PLEADING, 5.

Review of judgment. See PRINCIPAL AND SURETY, 15.

1. *Evidence*.—A judgment is always evidence of the fact that such a judgment has been given, and of the legal consequences which result from that fact, whether the person against whom it is offered in evidence was a party to the action in which it was rendered or not. *Maple et al. v. Beach*, 51
2. *Same*.—But when a judgment is offered, not merely as evidence of its own existence, but as proof of some fact or facts upon the supposed existence of which the judgment was founded, the general rule is, that it is not binding upon any one except the parties thereto, those who might legally have become parties, and those in privity with them. *Id.*
3. *Same*.—The binding force and effect of a judgment offered in evidence must be mutual. *Id.*

JUDICIAL NOTICE.

See LIQUOR LAW, 5.

JURISDICTION.

See PRIVATE ROAD, 2; SUPREME COURT, 21.

1. *Judgment of Inferior Court*.—Where the jurisdiction of an inferior court depends upon a fact which such court is required to ascertain and settle by its decision, such decision is conclusive, except in a direct proceeding to reverse or set aside the judgment. *Hornaday v. The State*, 306
2. *Same*.—*Liquor Law*.—The question of whether proper notice by publication had been given by an applicant for license under the liquor law of 1859 could not be inquired into in a prosecution against such person for retailing intoxicating liquor without a license. *Id.*
3. *Of Person*.—When parties are once rightfully in court, the court has jurisdiction over them, and that jurisdiction continues, without further notice, as long as any steps can be rightfully taken in the cause. *Burnside v. Ennis*, 411

4. *Forcible Entry and Detainer*.—The statute confers jurisdiction, in cases of forcible entry and detainer, upon justices of the peace and also upon courts of common pleas. *Witz v. Haynes*, 470
5. *Court of Common Pleas*.—In the court of common pleas, where it did not appear upon the face of the complaint, or by a subsequent pleading verified as the statute required, that the title to real estate was in issue, the jurisdiction of the court was not ousted. *Id.*

JURY.

See ARBITRATION AND AWARD, 5; EVIDENCE, 5, 6; MALICIOUS PROSECUTION, 6.

JUSTICE OF THE PEACE.

See APPEAL, 1, 2, 3; ARREST, 8; JURISDICTION, 4; REPLEVIN BAIL, 1, 2; SUPREME COURT, 12.

Pleading.—Evidence.—Under the general denial, in an action before a justice of the peace, on an account for goods sold and delivered, evidence may be given of payment, and that the goods, for the value of which the action is brought, were furnished on the order of a third person.

Lane et al. v. Kenworthy, 116

LANDLORD AND TENANT.

See HUSBAND AND WIFE, 6 to 9.

LICENSE.

See DAMAGES, 1; JURISDICTION, 2; LIQUOR LAW, 1, 2.

LIMITATIONS, STATUTE OF.

See STATUTE OF LIMITATIONS.

LIQUOR LAW.

See JURISDICTION, 2.

1. *License.—Appeal*.—An application for a license to sell intoxicating liquors, under the act of March 5th, 1859, was refused by the county commissioners, and the applicant appealed to the circuit court, from the decision of which court certain remonstrants appealed to this court.
Held, that under the act of 1861, the decision of the circuit court was final, conclusive, and without appeal to the Supreme Court.
Turner et al. v. Rehne, 208
2. *Same.—Signature to Application*.—Under the act of 1859, it was not requisite that any other person than the applicant should sign his petition for a license to retail intoxicating liquors. *Hornaday v. The State*, 306
3. *Intoxicating Liquor*.—The Act of Feb. 27th, 1873, relating to the sale of intoxicating liquors (Acts 1873, p. 151) has no provision defining what the words "intoxicating liquor" apply to. *Klare et al. v. The State*, 483
4. *Same.—Beer.—Evidence*.—The mere naked opinion of a witness that common brewer's beer is intoxicating, founded upon no knowledge of its effects, or of what it is composed, or how it is made, is not sufficient to show that it is intoxicating. *Id.*
5. *Judicial Notice*.—A court will not take judicial notice that common brewer's beer is intoxicating; and before a party who has sold such beer can be convicted of selling intoxicating liquor, it must be proved that the beer sold was intoxicating. *Id.*

6. *Sale to Minor by Bar-Tender*.—Where a bar-tender in charge of a saloon, in the absence of the proprietor, who had a license or permit, and without his knowledge, sold liquor to a minor;

Held, that the proprietor was not liable for a violation of section six of the act relating to the sale of intoxicating liquors, Acts 1873, p. 154.

Hanson v. The State, 550

MALICIOUS PROSECUTION.

See ARREST; FALSE IMPRISONMENT.

1. If an imprisonment be under legal process, but the action has been commenced and carried on maliciously and without probable cause, it is malicious prosecution. *Boaz et al. v. Tate*, 60
2. *Malice.—Probable Cause.—Evidence*.—In an action for malicious prosecution, evidence offered by the defendant to prove that before the prosecution against the plaintiff was commenced, he consulted for advice and direction one who had for twelve years been a justice of the peace, but who was not the justice before whom the prosecution was commenced, and made to him a full and fair statement of all the facts, and was by him advised to institute the proceeding, is inadmissible, for the purpose of showing that the defendant acted with probable cause and without malice. *Burgett v. Burgett*, 78
3. *Same*.—If the defendant in such action, before the suit alleged to have been malicious was instituted, in good faith consulted a practising attorney, and made to him a full and fair statement of his case, and was advised by the attorney to prosecute his complaint, this is a strong circumstance to repel the presumption of malice and want of probable cause. *Id.*
4. *Same.—Statements of Credible Persons*.—A defendant in such an action, in making up his belief of probable cause for instituting the prosecution alleged to have been malicious, is justified in giving credit to the statements of credible persons, whom he believes. *Id.*
5. *Same*.—In an action for damages for malicious prosecution, evidence of the general bad character of the plaintiff for morals is inadmissible to rebut evidence of want of probable cause. *Oliver v. Pate*, 132
6. *Same*.—The existence of malice is not imputed as a conclusion of law, but may be inferred as a fact from the want of probable cause. It is for the jury to determine whether they will so infer it or not. *Id.*
7. *Pleading*.—In an action for malicious prosecution, to allege that the defendant falsely, maliciously, and without any reasonable or probable cause, filed his affidavit charging the plaintiff with having committed a criminal offence, is sufficient, without repeating the allegation of malice and want of probable cause in connection with the averments concerning the issuing of the warrant, the arrest, and the imprisonment. *Ruston v. Biddle*, 515

MALPRACTICE.

See NEGLIGENCE, 1, 2.

MANDATE.

See CITY, 3.

MARRIED WOMAN.

See HUSBAND AND WIFE; PRINCIPAL AND SURETY, 1.

MORTGAGE.

See CONTRACT, 2, 3, 4; VENDOR AND PURCHASER, 3; WILL, 5.

1. *Equity of Redemption.—Set-Off.—Vendor and Purchaser*.—The assignee of an equity of redemption, who accepts a deed without covenants for the

mortgaged estate, takes it charged with the mortgage debt. In the absence of a special contract, or without some special circumstances, the purchaser must be held to take the land charged with the incumbrance. He cannot pay off the debt, and then keep it alive by taking an assignment of it to himself, and set it off against an unpaid balance he may still owe his vendor on his purchase. *Atherton v. Toney et al.*, 211

2. Vendor and Purchaser.—Incumbrance.—Indemnity.—Chattel Mortgage.—

A vendee of encumbered land, for which he paid full price, took from his vendor a mortgage on chattels to indemnify against such incumbrance. The mortgage was in the form prescribed by statute for a mortgage of real estate, and contained this clause: "The above property vests in mortgagee when mortgagor attempts defraud." The mortgagor resided in Tippecanoe county, and the chattels were in Montgomery county, and the mortgage was recorded in Montgomery county. The mortgagor attempted to defraud the mortgagee, and he, learning the fact, although the incumbrance on the land was not due, and as to it there was no default, seized and took possession of the mortgaged chattels. After he had so come into possession, a third party recovered a judgment against the mortgagor, and an execution was issued, and by direction of the mortgagor the sheriff levied upon the mortgaged chattels in the possession of the mortgagee. The incumbrance on the land was still not due, and as to it there was no default, when the execution was levied;

Held, that the chattel mortgage, in the form prescribed by statute for a mortgage of real estate, was a valid mortgage and sufficient in respect to its form to vest in the mortgagee an interest in the property according to the apparent intent of the parties.

Held, also, that by the language, "the above property vests in mortgagee when mortgagor attempts defraud," it was intended that the mortgagee should have the right to the possession of the property in the event that the mortgagor attempted to defraud him by some act having a tendency to defeat the mortgage security.

Held, also, that the failure to record the mortgage in the county in which the mortgagor resided rendered such mortgage void as to all persons other than the parties thereto, whether such persons had or had not acquired a lien upon the property.

Held, also, that the execution plaintiff not having been a party to the mortgage, it was void as to him, and the mortgaged property was subject to his execution.

Held, also, that the incumbrance on the land not being due when the mortgagee took possession or when the execution was levied, he had not become the absolute owner of the property; and as he had no claim except by virtue of the mortgage, if that was invalid for want of legal registration, he had no legal or valid claim to the property as against creditors of the mortgagor. *Sidener et al. v. Bible*, 230

3. Chattel Mortgage.—Equity of Redemption.—The question whether the mortgagor of chattels, after forfeiture, has an equity of redemption or not, was discussed, but not decided. *Id.*

4. Same.—Possession of Mortgaged Property.—Sureties, who have paid the debt of their principal and who hold a mortgage upon a chattel to indemnify them, where the mortgage provides that if the debt is not paid at maturity by the mortgagor the sureties shall have possession of the mortgaged property, may recover possession thereof.

Mill et al. v. Malott et al., 248

5. Same.—Growing Crop.—Effect of Recording.—Where ten acres of growing wheat was mortgaged, and the mortgage duly recorded, and afterward the mortgagor, without the consent or knowledge of the mortgagee, harvested, threshed, removed, and sold the wheat, and the purchaser converted it to his own use by mixing it with other wheat;

Held, that the title to the wheat was vested in the mortgagee, and the recording of the mortgage was constructive notice to the purchaser.

Held, also, that the mortgagee could recover the value of the wheat of the purchaser, by identifying the wheat purchased as the wheat that was mortgaged, though the purchaser bought the wheat in the usual course of trade, and without actual notice. *Duke v. Strickland*, 494

6. *Same.—Evidence.*—Parol evidence is admissible to identify chattels mortgaged. *Ib.*

7. *Same.—Possession.*—The recording of a chattel mortgage, under the tenth section of the statute of frauds (1 G. & H. 352), dispenses with the necessity of an actual delivery of the property to the mortgagee. *McCord v. Cooper*, 30 Ind. 9, overruled. *Ib.*

8. *Senior and Junior Mortgages.—Redemption.—Proceeds of Sale on Foreclosure.*—A. mortgaged certain real estate to B. Afterward he made a second mortgage of the same real estate to C., and after that a third mortgage to D. C. assigned his note and mortgage to E. B. foreclosed his mortgage, and D. was a party to the proceedings and filed his cross bill against the mortgagor, but he was not served with process, nor did he appear to the cross bill. Neither C. nor E. was made a party, nor had they notice of the proceeding. The decree ordered the sale of the real estate and directed the proceeds to be first applied to the payment of B.'s mortgage, second to the payment of D.'s mortgage, and the overplus, if any, to be paid to the mortgagor. The real estate was sold on the decree, and D. became the purchaser. B.'s mortgage was paid out of the proceeds, and the residue, with the consent of the mortgagor, was paid to D. After the sheriff's sale, the mortgagor conveyed the real estate by warranty deed to D., and D. afterward sold and conveyed to F., and after the expiration of one year he also received a deed from the sheriff. A. at the time of the decree was insolvent, and so continued to be, and the real estate became so depreciated in value that it was not worth more than the amount of the mortgage of B.

Held, that the decree of foreclosure and the sale of the real estate did not affect the rights of E.

Held, also, that the equity of the mortgagor and all other parties to the action were barred by the decree and sale; but as to E., the proceedings only had the effect of transferring to the purchaser the interest of the mortgagee in the mortgage foreclosed, and he occupied the position of an assignee.

Held, also, that E. could foreclose his mortgage, and redeem the mortgaged premises by paying the amount of B.'s mortgage, as if there had been no foreclosure.

Held, also, that E., having lost no rights by the foreclosure, had no right to any avails of the sale, or any equity that authorized a marshalling of the surplus according to priorities.

Held, also, that a depreciation in the value of the real estate since the sheriff's sale could not affect the rights of the parties.

McKernan v. Neff et al., 503

9. *Junior Mortgage.—Recording.—Notice to Purchaser under Senior Mortgage.* If a junior mortgage has been duly recorded, a purchaser of the mortgaged premises on a foreclosure rendered on a senior mortgage will be presumed to have bid and purchased with reference to the junior mortgage, and with knowledge of the right of the holder of that mortgage to redeem. *Ib.*

10. *Same.*—A purchaser from one who bought at a sheriff's sale under a decree of foreclosure will be affected by all defects and irregularities of the sale that appear of record, and is bound to take notice of a junior mortgage and that the holder of such mortgage was not a party to the foreclosure proceedings. *Ib.*

11. *Same.*—A middle mortgagee, who was not a party to proceedings of foreclosure on the senior mortgage, cannot elect to affirm a sale made to the junior mortgagee on a decree rendered upon the senior mortgage in such proceedings, and recover of the junior mortgagee the surplus after paying the senior mortgage. *Ib.*

NEGLIGENCE.

See RAILROAD, 4.

1. *Pleading.—Malpractice.—Contributory Negligence.*—Where a complaint alleged that the defendants were practising physicians and surgeons, and as such undertook to set a broken arm of the plaintiff's infant son, and that by reason of their unskilfulness, negligence, and want of care in treating the arm, it inflamed, mortified, and had to be amputated;
Held, that the averments were sufficient to show that the plaintiff and his son were without fault, and that their negligence did not contribute to the result.
Held, also, that the allegation that the injury was caused by the want of professional skill and care of the defendants must be proved, and was not sustained if it appeared that the negligence of the plaintiff, or of his son, contributed to the injury. *Scudder et al. v. Crossan*, 343
2. *Same.*—A complaint, alleging that the defendants, being physicians and surgeons, were called on and requested, for a reasonable compensation, to set a broken arm of the plaintiff's son, and that they undertook the same, was not bad on demurrer for not showing who employed the defendants; if uncertain in this respect, a motion to have it made more specific was the proper remedy. *Ib.*

NEW TRIAL.

See PRACTICE, 4, 13; SUPREME COURT, 19, 20.

1. *Motion.—Demurrer.*—The erroneous sustaining of a demurrer to a complaint is not a reason for a new trial.
Chase v. The Artic Ditchers, 74
2. *Same.*—Error in overruling or sustaining a demurrer is not a ground for a new trial.
McDill v. Gunn et al., 315
3. *Motion.*—A motion for a new trial, on the ground that the court erred in admitting evidence offered by the plaintiff over the defendant's objection, is too indefinite to raise any question for review. *Burdge v. Lewis*, 349
4. *Motion.—Demurrer.*—Error in overruling a demurrer is not a cause for a new trial.
Snell v. The State, ex rel. Keller et al., 359
5. *Motion.—Demurrer.*—Error in ruling upon a demurrer, or on a motion to strike out part of a pleading, is not in any case a reason for a new trial.
The O. & M. R. W. Co. v. Hemberger, 462
6. *Same.—Evidence.*—A motion for a new trial on the ground of erroneously admitting or excluding evidence must indicate the evidence so admitted or excluded. *Ib.*

NOTICE.

See DAMAGES, 2; PRIVATE ROAD, 2; SUPREME COURT, 1, 2, 3, 13.

NOVATION.

See CONTRACT, 1.

OBTAINING MONEY BY FALSE PRETENCE.

See CRIMINAL LAW, 2.

OFFICE AND OFFICER.

See ARREST, 1 to 7; SHERIFF.

1. *Office.—Resignation of.*—A written resignation of an office, to take immediate effect, when transmitted by the officer to, and received by, the officer

or authority appointed to receive it, cannot be withdrawn, and there is then a vacancy in the office. *The State, ex rel. Lockhart, v. Hauss*, 105

2. *Same.—Sheriff.*—A written resignation of the office of sheriff, to take immediate effect, cannot be withdrawn after it has been received by the governor, even with the governor's concurrence. *Id.*

PARTIES.

See RAILROAD, 3; SUPREME COURT, 1, 2; WITNESS.

Discharge in Bankruptcy.—Pleading.—Where an obligation is joint, all the makers are necessary parties to an action thereon; and though one of the joint makers of a promissory note may have received a discharge in bankruptcy, yet such a discharge being a personal privilege which must be pleaded, he is a necessary party to the action on the note.

Jenks v. Opp, Adm'r, 108

PARTITION.

See WILL, 7.

Pleading.—An answer in a partition proceeding alleging that real estate belonging to the defendant was exchanged for the real estate sought to be partitioned, and that the title to the latter real estate should have been made to the defendant, and alleging that the title was held in trust for the defendant, is good on demurrer, though it does not particularly describe the real estate of the defendant which was exchanged for the real estate in question.

Davis et ux. v. Davis et al., 56

PARTITION FENCE.

See DEMAND, 2.

PARTNERSHIP.

1. *Part Payment by one Partner.—Effect of.—Consideration.—Principal and Surety.*—Two partners, owing debts and having assets, dissolved partnership, and, by agreement, one partner was to retain all the assets, and pay all the debts, and manage and close up the business. The partner who had withdrawn from the management of the business, desiring a discharge from further personal liability on a certain note made by said firm and held by one of the creditors thereof, acquainted such creditor with the facts of the partnership arrangement, and proposed to pay him one-half the amount of said note, the creditor to relieve him from further liability and look to the effects in the hands of the former partner and to such partner personally for the other half; which proposition the creditor accepted, and one-half the amount of said note was then paid accordingly.

Held, that such part payment was not a sufficient consideration for the promise to release the party making it as to the remainder.

Held, also, that the arrangement between the partners and the part payment of the note did not so change the relations between the former partners as to make the one who made part payment a surety for his former partner for the payment of the residue, so as to bring them within the provisions of the statute, secs. 672, 673, pp. 306, 307, 308, 2 G. & H. To enable a party to proceed under that statute, it may be laid down as a general rule that he must have been a surety at the inception of the contract.

Held, also, that if the statute governing principals and sureties did apply, a notice from the surety to the creditor, that "if you think" such surety "in any way liable, you will take notice to proceed accordingly and legally," did not conform to the statute, so as to require the creditor forthwith to sue on the note.

Fensler v. Prather, 119

2. *Agreement between Partners.*—Two partners, being indebted, dissolved the partnership, and, by agreement, one received all the assets and was to

pay all the debts; and he failing to pay, the other was compelled by legal proceedings to do so.

Held, that the latter could recover from the former the amount so paid.

Hinkle v. Reid, 390

PATENT.

See CONSTITUTIONAL LAW.

PLEADING.

See CITY, 5; CORPORATION, 1, 2; DECEDENTS' ESTATES, 4; FALSE IMPRISONMENT, 4, 6; INJUNCTION 1; INSURANCE, 1; JUSTICE OF THE PEACE; MALICIOUS PROSECUTION, 7; NEGLIGENCE, 1, 2; PARTIES; PARTITION; PRINCIPAL AND SURETY, 10, 11, 12, 13, 15; PROMISSORY NOTE, 3; REPLEVIN, 3, 4, 5; TRESPASS, 1.

1. *Representations.—Opinion.*—An answer to a suit upon a promissory note, alleging that the note was given in consideration of the assignment of a patent right, that the payee exhibited letters patent and a model of the machine patented, and claimed that the machine, if properly constructed, would do its work well, etc., and that the defendant relied on the representations, and when the machine was properly constructed and fairly tested, it failed to produce the result claimed for it, and was of no value, was held bad on demurrer. *Hunter et al. v. McLaughlin*, 38
2. *Same.*—As the answer did not show that the payee had ever made and used a machine, made after the model and letters patent, or that he represented to the defendant that he had made and used such a machine, the statements made were nothing more than a mere expression of opinion, which, for aught that appeared, the payee might have honestly entertained. *Ib.*
3. *Cross Complaint.*—A cross complaint can only relate to the matters in question in the original complaint. *Ib.*
4. *Complaint.*—A complaint must show a cause of action in favor of all those who unite as plaintiffs. *Maple et al. v. Beach*, 51
5. *Judgment.*—Where a judgment is the foundation of an action, a copy of it need not be filed with the complaint. *Hinkle v. Reid*, 390
6. *Conditions Precedent.—Rule at Common Law.*—At common law, in pleading a condition precedent, if there be anything specific or particular in the thing to be performed, though consisting of a number of acts, performance of each must be particularly stated. *The Home Ins. Co. of N. Y. v. Duke*, 418
7. *Same.—Rule Under the Code.*—The code (2 G. & H. 108, sec. 84) provides that in pleading the performance of a condition precedent in a contract, it is sufficient to allege generally that the party has performed all the conditions on his part. *Ib.*
8. *Same.*—In pleading performance of a condition precedent, if a party does not make the general allegation authorized by the code, but undertakes to make a specific allegation of performance, he must make it with the particularity and strictness required by the rules of the common law. *Ib.*
9. *Tender.*—In pleading an offer to perform an agreement to pay the value of the pasturage of a horse until a certain time, it is not sufficient to say that a certain sum of money was tendered, without averring that it was a sufficient or reasonable compensation. *Bailey v. Troxell*, 432
10. *Paragraph.*—Each paragraph of a pleading must be perfect and complete within itself, and defective allegations in one paragraph cannot be aided by reference to another. *Silvers v. The Junction R. R. Co. et al.*, 435
11. *Demurrer.*—Where an answer of general denial is pleaded, it is not error for which a cause will be reversed to sustain a demurrer to a paragraph of answer containing only such facts as are admissible in evidence under the general denial. *The O. & M. R. W. Co. v. Hemberger*, 462;
Wilson et al. v. Root et al., 486

PRACTICE.

See BILL OF EXCEPTIONS; INSTRUCTIONS TO JURY; NEW TRIAL; SUPREME COURT.

1. *Appearance.—Summons.—Service of.—Waiver.*—It is too late, after an appearance has been made to an action, to object to the summons or the service thereof. *The Adams Express Co. v. Hill*, 157
2. *Special Finding.*—When a party desires to object to the conclusions of law upon a special finding by the court, he should except to such conclusions of law; a motion for judgment on the special finding in favor of the party against whom the finding is made presents no question for review in the Supreme Court. *Lynch et al. v. Jennings*, 276
3. *Motion.—Bill of Exceptions.*—Motions to strike out portions of pleadings, to reject pleadings, or to require the separation of the same into distinct paragraphs, are unavailing on appeal to the Supreme Court, unless incorporated into the record by bill of exceptions. *Ib.*
4. *Evidence.—Objection to.—Motion for New Trial.*—On appeal, in order to raise the question of the admission of improper evidence, the attention of the court below must have been called to the improper evidence, and it is necessary to point it out in the motion for a new trial. *McDill v. Gunn et al.*, 315
5. *Supreme Court.—Demurrer.*—Where no demurrer is in the record, this court cannot say that any was filed assigning as cause that the complaint does not state facts sufficient to constitute a cause of action. *Burdge v. Lewis*, 349
6. *Weight of Evidence.*—A judgment will not be reversed simply because the verdict was against the weight of evidence. *Ib.*
7. *Bill of Exceptions.*—If a party seeks to take advantage of a ruling in admitting, refusing to admit, or striking out, or refusing to strike out evidence, the evidence concerning which the ruling has been made must be presented in the record. *Nudd et al. v. Holloway*, 366
8. *Dismissal Pending Motion for New Trial.*—While a motion for a new trial is pending, it is error to call the cause for trial and dismiss it for want of prosecution. *Burnside v. Ennis*, 411
9. *Pleading.—Trial.*—If a demurrer to a bad paragraph of a complaint has been overruled, and the record does not show that the trial was had exclusively under a good paragraph, the judgment will be reversed. *Bailey v. Troxell*, 432
10. *Judgment without Disposal of Issue.*—There cannot be a final judgment rendered against a plaintiff while there is one good paragraph of a reply undisposed of by demurrer or trial. *Silvers v. The Junction R. R. Co. et al.*, 435
11. *Appearance.—Default.—Trial.*—Where a defendant appears and files an answer of set-off, he may take a rule upon the plaintiff to reply, and on failure to reply, judgment may be taken for the defendant for want of a reply; but if the defendant abandons his defence, and does not appear at the trial until he is defaulted, he waives his right in this respect, and the trial may proceed as if the matters alleged in the answer had been denied. *Aston v. Wallace*, 468
12. *Exception to Finding.*—Where there is no special finding by the court according to section 341 of the code (2 G. & H. 207), a mere exception to the finding of the court, noted by the clerk, does not put a question upon the record to be reviewed by the Supreme Court. *Brown et al. v. Brown*, 474
13. *Special Finding.*—Where the court, the record not showing it to have been requested by either party, finds the facts specially and states conclusions of law thereon, a motion for a new trial can raise no question for review as to the correctness of such conclusions. *Rose v. Duncan*, 512

14. *Interrogatories to Jury*.—The statute authorizes the propounding of interrogatories to be answered by the jury, only where there is to be a general verdict.
Hopkins et ux. v. Stanley et al., 553
15. *Special Verdict*.—Either party may demand a special verdict, and when demanded, the jury are to find the facts only, leaving judgment thereon to the court. In such case, it is the right of each party to draw up in proper form, to be submitted to the jury, a statement of such facts as he conceives the evidence establishes. The jury may adopt either the one or the other, if in their judgment the evidence justifies it, or they may adopt either the one or the other in part and reject part, as the evidence may require, or they may reject both and make a statement of facts which they find to have been proved. *Ib.*
16. *Same*.—Where a special verdict is demanded, and the parties do not object to the propounding of interrogatories covering the material facts in the case, but assume that such is the correct practice, by preparing and submitting interrogatories, they may be deemed to have waived the finding of a special verdict in the usual form. *Ib.*
17. *Interrogatories to Jury*.—Where interrogatories are propounded to a jury which involve a finding of facts material to a correct decision of the cause, the answers must be positive and certain. Answers expressing only the inclination of the minds of the jury, as to say, "we think not," etc., are insufficient and too uncertain to base a judgment upon. *Ib.*

PRINCIPAL AND AGENT.

See CORPORATION, 3.

PRINCIPAL AND SURETY.

See MORTGAGE, 4; PARTNERSHIP, 1; SHERIFF, 2, 4; SUBROGATION, 3.

1. *Married Woman*.—*Promissory Note*.—Where there is no fraud, duress, deceit, or violation of law or public policy on the part of the payee, in procuring the execution of a promissory note, the sureties of such note are liable, although the principal be not; as where the principal is a married woman.
Davis et al. v. Staats, 103
2. *Contribution*.—Complaint by A. against B. and C. for contribution, alleging that D., for the purpose of negotiating a loan from a bank in Lafayette, made his promissory note signed by himself as principal and said A. as surety, payable at a bank in New York; that D. presented said note to said B. and C., who severally, in order, indorsed it as accommodation indorsers thereon and as co-sureties with him, the said A.; that A., B., and C. had not any actual interest in the note or the loan sought to be secured thereby; that it was signed by said A. and indorsed by said B. and C., to enable D. to procure a loan; that D. discounted and sold the note to the bank of Lafayette; that it was not paid at maturity; that the bank brought suit and recovered judgment against all the parties to the note; that execution was issued and levied upon the property of said A., and he was compelled to pay the judgment; that the principal maker was insolvent.
Held, that no action could be maintained by the indorsee of the note against B. and C. as co-sureties. The terms of the writing and the indorsement fixed the liability of each signer, so as to render it unchangeable by parol evidence in such action. *Ib.*
Held, also, that as between the parties who executed the paper before it had been negotiated or delivered by the principal, the real character of the transaction might be shown by parol. *Ib.*
Held, also, that the allegations in the complaint were sufficient to show the real character of the transaction and the liabilities of the parties to each other

and that an issue of fact could be formed between them, as to whether they were or were not co-sureties as averred in the complaint.

Harshman v. Armstrong et al., 126

3. *Extension of Time*.—Where there is an extension of time, for a definite period, by the payee to the principal of a promissory note, for a valuable consideration, without the consent of the surety, the surety is discharged.
Jarvis v. Hyatt, Ex'r, 163
4. *Same*.—*Pre-payment of Interest*.—From the payment of interest in advance, by the maker to the holder of a promissory note, whether at the rate specified in the note, or at a higher rate, and the receipt thereof by the holder as interest, an agreement is implied to extend the time of payment during the period for which interest is thus paid. *Id.*
5. *Same*.—*Extension of Time Indefinitely*.—Where there is an agreement for the extension of time of payment of a promissory note generally, for no definite time, and interest has been paid in pursuance of such agreement, but not in advance, there is no implied agreement to extend the time of payment for any particular length of time, and the surety is not discharged. *Id.*
6. *Same*.—On a note dated March 7th, 1859, payable twelve months after date, with interest at the rate of six per cent., the receipt of an increased rate of interest and indorsement of payment of such interest on the note as follows: "March 7th, 1860, interest paid up to this date," did not operate as an agreement for an extension of the time of payment. *Id.*
7. *Promissory Note*.—*Additional Surety*.—*Alteration*.—Adding a name to a note as an additional surety, with the assent of the payee, and with the assent and at the request of the personal representative of the original surety, and with the agreement that the estate should not be released, was not such an alteration as would release the estate of the original surety.
Voiles v. Green, Adm'r, 374
8. *Interest*.—*Extension of Time of Payment*.—Where interest has been paid in advance, under an agreement to extend the time of payment of the principal debt, it is not of any importance in a suit against a surety that the rate of interest paid was greater than the legal rate.
Hamilton v. Winterrowd et al., 393
9. *Same*.—*Implied Agreement to Forbear*.—If a creditor receives of his debtor interest on his debt in advance, the law implies from such transaction an agreement of forbearance during the time for which such interest is paid in advance, unless there is an agreement to the contrary. An agreement for forbearance need not be express. *Id.*
10. *Pleading*.—It is sufficient to state in a pleading facts from which the law implies an agreement, without in terms averring the agreement. *Id.*
11. *Same*.—In a suit on a note, though an answer by a surety allege that the time of payment of the note was, for a valuable consideration, extended for six months, without the surety's knowledge or consent, and the facts alleged are such that the law will imply an extension of time for a shorter period, the answer will be good on demurrer. *Id.*
12. *Same*.—In an action on a promissory note, an answer by sureties alleging that at the maturity of the note the creditor, without the knowledge or consent of the sureties, received of the debtor a certain sum of money, being "the interest then due and the interest in advance for six months," and extended the time of payment of said note six months, is good, though the sum alleged to have been paid would not more than cover the amount of interest that appeared to be due at the date of the payment; the answer not showing but that a part of the accrued interest had before that time been paid.
Hamilton v. Winterrowd et al., 398
13. *Same*.—In a suit on a note, an answer by a surety, alleging that the plaintiff agreed with the principal debtor without the knowledge and consent of said surety, that if the debtor would pay interest in advance at the rate of

twelve per cent. per annum, the plaintiff would extend the time of payment for ninety days, and that said debtor did pay said interest at twelve per cent. per annum for ninety days and plaintiff did give such extension, sufficiently showed that the interest was paid in advance, and was a good answer.

Hamilton v. Winterrowd et al., 401

14. *Extension of Time.—Promise of Surety after Extension.*—Where the payee of a note has, for a good consideration, given an extension of the time of payment to the principal, without the consent of the surety, a promise afterward made by the surety to pay the debt, made in ignorance of the fact that the time of payment had been extended by the payee, is not binding on the surety.

Montgomery v. Hamilton et al., 451

15. *Same.—Complaint to Review.*—A complaint by a surety to review a judgment rendered upon a promissory note, and to restrain the levy of an execution, alleging that he suffered judgment to go by default, not knowing that he had any defence to the action, but that since the execution issued, he had for the first time learned that the payee of the note had, on divers occasions, taken interest in advance and extended the time of payment to the principal, without the knowledge of the surety, was held good.

Ib.

PRIVATE ROAD.

1. *Petition.—Land-Owners.*—In an action to recover damages and to restrain the defendant from tearing down fences and opening a private road through the land of the plaintiff, the name of the plaintiff being mentioned in the petition for the road;

Held, that the plaintiff could not attack the validity of the proceedings to establish the road on the ground that the names of all the owners of lands over which the road was to pass were not mentioned in the petition.

Wild v. Deig et al., 455

2. *Same.—Notice.—Jurisdiction.*—That notice has been given of a petition for the opening of a private road, is a jurisdictional fact that must be proved, before the board of commissioners can act on the petition; and if the record shows a finding that due notice was given, it is conclusive.

Ib.

3. *Same.—Constitutional Law.—Eminent Domain.*—The statute authorizing the location of private roads, as far as it provides for the exercise of the right of eminent domain to establish them, is unconstitutional.

Ib.

PROMISSORY NOTE.

See ACTION; CONSTITUTIONAL LAW; PRINCIPAL AND SURETY, 7.

1. *Payable in Bank.*—A promissory note payable "at the bank in Delphi" is not negotiable as an inland bill of exchange.

Porter et al. v. Holloway, 35

2. *Same.—Evidence.*—Whether or not a note is payable in a bank in the State must appear on the face of the note, and cannot be ascertained or shown by extrinsic evidence.

Ib.

3. *Pleading.—Want of Consideration.*—To a suit brought by an indorsee of a note payable in bank, a general answer of want of consideration, and that such want of consideration was known to the plaintiff when he procured the assignment of the note from the payee, is sufficient.

Hunter et al. v. McLaughlin, 38

PROSECUTING ATTORNEY.

See EVIDENCE, 7.

RAILROAD.

See CORPORATION, 3; EVIDENCE, 8, 12.

1. *Tax to Aid in Construction.*—Where the county commissioners, on a proper petition, ordered an election to be held in a township of the county, to determine whether an appropriation should be made by the township to aid in the

construction of a railroad, and the election was held, and resulted in favor of the appropriation; and afterward the boundary line between the township voting to make the appropriation and an adjoining township was changed, so as to detach from the latter a strip of land one-half a mile wide and annex the same to the former; and the railroad, after the vote was so taken, was located and built in and through the strip of territory so annexed, without passing into or through the territory which constituted the township at the time the vote was taken;

Held, that no tax to aid in the construction of the railroad, as it was located and built, was authorized to be levied by the vote taken.

Held, also, that, to authorize the levy, the road should be built within the territory of the township as it existed at the time the vote was taken.

Alvis et al. v. Whitney et al., 83

2. *Fences.—Killing Cattle.*—Railroad companies are not required to fence their tracks at stations and sidings where freights or passengers are received or discharged; nor are they liable to pay for cattle that may wander upon the track at such places, and be killed without negligence on the part of the company.

The I. & St. L. R. R. Co. v. Christy 143

3. *Killing Animals.—Parties.*—Under the statute, the company owning a railroad is liable for stock killed by a train on such road, without reference to the company or persons who may have been running the locomotive or cars that caused the injury; and such company owning the road may be sued alone.

The Ft. W., M., & C. R. R. Co. v. Hinebaugh et al., 354

4. *Same.—Contributory Negligence.*—If the owner of a cow knowingly permits her to run at large in the vicinity of a railroad, where it is not required by law to be fenced, and she strays upon the track and is killed, it not appearing that the killing is wilfully done, the railroad company will not be liable, though the owner may not have known that the railroad was completed.

The F., M., & I. R. R. Co. v. Adams, 402

5. *Summons.—Service.*—In an action against a railroad company to recover the value of stock killed, a return of the summons, "Served by reading to" A., "who is the local freight agent of said defendant, at the city of," etc., does not show good service under section 30 of the code.

The T., W., & W. R. W. Co. v. Owen, 405

6. *Same.—Statute Construed.*—Section 30 of the code contemplates cases where a corporation, company, or an individual has an office or agency in the county for the transaction of business, and the suit grows out of, or is connected with, the business of such office or agency.

Id.

7. *Same.*—Section 36 of the code designates three classes of officers or agents of corporations, upon whom process may be served; first, chief officers; second, officers of secondary rank; third, any persons authorized to transact business in the name of the corporation.

Id.

8. *Same.*—If no officer of the first or second class can be found, the service may be upon an agent or person of the third class. If the service is upon an officer or person of the second or third class, it must appear by the return that the officer or officers of the higher grades were not found in the county.

Id.

9. *Same.*—Under the act of March 4th, 1853 (note to 2 G. & H. 62), as amended (Acts Special Session, 1861, p. 78), the persons who may be served with process against a corporation whose principal office is not in this State are all of one grade, and service on any one of them is good without reference to whether others are found or not.

Id.

10. *Same.—General Agent.*—A local freight agent is a general agent of a railroad corporation within the meaning of the above act, and service on such agent is good, though there be a superintendent of the road and a director of the company residing in the county, and conductors daily passing on the trains.

Id.

11. *Killing Stock.—Fence.*—That a place on a railroad where an animal is

killed is within a city, is not sufficient to excuse the company from fencing the road. *Ib.*

12. *Same.—Evidence.*—The plaintiff in a suit against a railroad company for killing an animal may show that after the killing the company repaired and built a fence at the point where the injury occurred, for the purpose of showing that the company regarded the place as one that might legally be fenced. *Ib.*

REAL PROPERTY, ACTION TO RECOVER.

1. *Insanity of Grantor.*—In a suit for the recovery of real property, where the complaint was in the statutory form and the defendant pleaded the general denial, the plaintiffs proved that they were the legal heirs of a deceased former owner of the land, and the defendant claimed title under a deed made by the ancestor of the plaintiffs.
Held, that it was competent for the plaintiffs to introduce evidence to show that their ancestor was insane when he executed the deed.
Brown et al. v. Freed et al., 253
2. *Same.—Title.*—The title of the heirs in such case is legal, and not equitable; the deed of the insane ancestor, being void, conveys no title, and his heirs take the legal estate by descent. *Ib.*

RECEIVER.

See INSOLVENT DEBTOR, 3.

RECORD.

Court.—Power over Record.—Courts have full and complete control of the record of their proceedings during the entire term at which such proceedings have been had; and during such term the court may for good cause correct, modify, or vacate any of its judgments; and where the record does not disclose upon what ground the court acted in correcting, modifying, or vacating a judgment, the Supreme Court will presume that it was done for a good and valid reason. *Burnside v. Ennis*, 411

REPEAL OF LAW.

See CRIMINAL LAW, 1, 4.

REPLEVIN.

1. *Part Owner of Chattel.*—One part owner of a chattel cannot bring an action against the other part owner or part owners to recover possession thereof. One has as much right to the possession as the other or others. *Mills et al. v. Malott et al.*, 248
2. *Same.*—A defendant in an action to recover possession of a chattel, who is a part owner with the plaintiff, cannot in his answer claim and have judgment for the possession of the part owned by such defendant; nor is it proper in such action to render judgment for the value of such part if possession be not given by the plaintiff. *Ib.*
3. *Pleading.*—In an action to recover the possession of personal property, the general denial is a good answer. Property in the defendant and another is also good, but unnecessary when the general denial is in. *Thompson et al. v. Sweetser et al.*, 312
4. *Same.—Property in Stranger.—Parties.—Arrest of Judgment.*—In an action to recover possession of personal property, where property in a stranger is pleaded, or where the evidence shows property in a stranger, it is not necessary that such person should be a party to the action, nor is the failure to make such person a party ground for arrest of judgment. *Ib.*

5. *Same.—Complaint.*—A complaint in replevin that does not allege ownership of the property, but only alleges a promise of the defendant to vest the ownership in the plaintiff on certain conditions being complied with, is bad. *Bailey v. Traxell*, 432

REPLEVIN BAIL.

1. *Attestation by Justice of the Peace.*—An undertaking of replevin bail, upon a judgment rendered by a justice of the peace, is void, if not attested by the justice. *Downey, C. J.*, dissented.
Houglund et al. v. The State, ex rel. McCool, 537
2. *Constable.—Suit on Bond.*—In a suit upon the bond of a constable, where the only breach alleged is a failure to levy upon the property of the replevin bail, if the undertaking of replevin bail be void, there can be no recovery. *Id.*

RESIDENCE.

See SUMMONS.

ROAD.

See PRIVATE ROAD.

RULE OF COURT.

Supreme Court. See *BURDICK v. HUNT ET AL.*, 301.
Rule 19 of Supreme Court. See *RUDISILL v. EDSALL*, 376;
MONTGOMERY v. HAMILTON, 450.

SEDUCTION.

Evidence.—Mitigation of Damages.—In an action for the seduction of the plaintiff's wife, it is competent for the defendant to prove, under an answer of general denial, in mitigation of damages, that owing to the wicked and depraved disposition of the plaintiff, he and his wife, before the alleged improper intimacy, lived unhappily together, that the plaintiff frequently cursed, abused, and struck her, and about three years before their final separation, drove her from his home, under threats of killing her.

Coleman v. White, 429

SET-OFF.

See MORTGAGE, 1.

SHERIFF.

See OFFICE AND OFFICER, 1, 2.

1. *Acts of Deputy.*—A sheriff is liable for the acts of his deputy or jailer within the scope of his authority. *Boaz et al. v. Tate*, 60
2. *Overpayment to.*—An overpayment to a sheriff on an execution, under a threat to levy if the sum demanded be not paid, is not a voluntary payment, but money obtained by the sheriff "by virtue of his office;" and in a suit on his official bond to recover such overpayment, his sureties are liable. *Snell v. The State, ex rel. Keller et al.*, 359
3. *Deputy.*—What a sheriff does by his deputy he does himself, and he is responsible for money paid to such deputy as if paid to himself in person. *Id.*
4. *Bond.*—A sheriff's bond is several as well as joint; and in a suit thereon against him and his sureties, although the court might render judgment against him and his sureties, yet that judgment has been rendered against him alone is no reason for reversing it on an appeal by said sheriff, neither the plaintiff nor the sureties complaining of the action of the court below. *Id.*

SPECIAL FINDING.

See PRACTICE, 2, 12, 13.

SPECIAL VERDICT.

See PRACTICE, 15, 16.

SPECIFIC PERFORMANCE.

See VENDOR AND PURCHASER, 1, 2.

STATUTE OF FRAUDS.

See MORTGAGE, 7; VENDOR AND PURCHASER, 3.

1. *Parol Agreement for Purchase of Real Estate.—Part Performance.*—Where A. and B. made a parol agreement with each other, that if B. would exchange certain of his real estate for certain real estate owned by C. and convey the real estate procured of C. to A., A. would pay to B. a certain price for the same;

Held, that the agreement was within the statute of frauds, and B. could not compel the performance of the contract by tendering a deed to A. for the real estate procured of C. and enforce the payment of the purchase-money.

Held, also (on petition for a rehearing), that the exchange by B. of his property for the real estate of C. was not a part performance of the contract between A. and B., so as to take the case out of the statute of frauds. *Eastburn v. Wheeler*, 23 Ind. 305, overruled. *Sands v. Thompson*, 18

2. *Sale of Chattels.*—In a contract for the sale of goods of the value of fifty dollars or more, where the purchaser pays a sum of money as earnest or part payment, such payment takes the sale out of the operation of the statute of frauds, and the contract may be proved by parol.

Baker v. Farmbrough et al., 240

STATUTE OF LIMITATIONS.

See VENDOR AND PURCHASER, 2.

STREET.

See CITY, 2, 3, 6.

SUBROGATION.

1. Several persons were owners of undivided interests in certain land, and judgments were rendered which were liens upon the interests of some of such owners. A proceeding for partition of the land was instituted, and while it was pending the judgment debtors sold their interests, and their vendee was substituted for them as a party to such partition proceeding. The land, not being divisible, was sold, and the purchaser paid the commissioner the full value of the land, without any knowledge of said judgment liens, which judgments he was afterward compelled to pay to protect his title.

Held, that the land having been converted into money, the rights of the parties to the money should be the same as they were in the land, and that the purchaser who had paid off the judgments was entitled to be subrogated to the rights in such money of the distributee thereof who should have paid such judgments, and to receive from such commissioner out of such distributee's share the amount paid to satisfy said judgments.

Spray v. Rodman et al., 225

2. *Same.*—Where one pays a debt which could not properly be called his own, but which it was his interest to pay, or which he might have been compelled to pay for another, the law subrogates him to all the rights of the creditor.

Id.

3. *Same.*—It is only in cases where the person paying a debt stands in the situation of a surety, or is compelled to pay in order to protect his own interests, or in virtue of legal process, that equity substitutes him in the place of the creditor, as a matter of course, without any special agreement. *Id.*

SUMMONS.

See PRACTICE, 1; RAILROAD, 5 to 10.

Service.—Return.—Residence.—Under a statute (2 G. & H. 582) requiring that summons shall be served by reading the same to the defendant, "or leaving a copy thereof at his last usual place of residence," etc., a return of service "by copy left at the residence" of the defendant is sufficient.

Pigg v. Pigg, 117

SUPERIOR COURT.

Costs.—Under the act providing for the organization of the Superior Court (Acts 1871, p. 48), the same rules of law in reference to costs prevail as in the circuit courts.

Hedrick v. Kramer, 362

SUPREME COURT.

See INSTRUCTIONS TO JURY, 2, 3; PRACTICE, 2, 3; RUDISILL *v.* EDSALL, 376; BURDICK *v.* HUNT, 381.

1. *Practice.—Notice of Appeal.*—Where some of the defendants in a judgment appealed to the Supreme Court, without causing notice of the appeal to be served on their co-defendants, as required by section 551 of the code, the appellants, in the assignment of error, making said co-defendants appellees, with the plaintiffs, and alleging that said co-defendants refused to join in the appeal, the court, of its own motion, set aside the submission and continued the cause for further process. *Rabb et al. v. Graham et al.*, 1
2. *Same.*—Under section 551, 2 G. & H. 270, it is the correct practice to unite with those who appeal their co-parties who do not appeal, in taking the appeal and in assigning the errors; those who appeal must then serve notice on those who do not, and file the proof thereof with the clerk. Unless the co-parties thus notified appear and decline to join in the appeal, they will be regarded as having joined, and will be liable for their due proportion of the costs. If they decline to join, their names may be struck out of the assignment of errors on motion, and they can not take an appeal afterward, or derive any benefit from the appeal, unless from the necessity of the case, or unless they are under legal disabilities. *Id.*
3. *Same.—Submission Set Aside.*—Where an appeal has been taken to the Supreme Court under the last clause of section 556 of the code, by procuring a transcript and filing it in said court, if there has been no notice of the appeal issued by the clerk of said court and served on the appellee or his attorney of record in the court below, or notice by publication as provided in section 557 of the code, and the cause has been submitted by the appellant upon default of the appellee, the submission will be set aside on motion of the appellee. *Johnson et al. v. Miller*, 29
4. *Evidence.*—Where the evidence is conflicting, the Supreme Court cannot, upon the evidence, reverse the judgment. *Lane et al. v. Kenworthy*, 116
5. *Appeal.—Within Three Years.—Reply.*—Where, on appeal to the Supreme Court, the appellee answered that the appeal was not taken within three years after the rendition of the judgment, an affirmative reply, the general denial being also filed, was wholly unnecessary, and was on motion struck out. *Harshman v. Armstrong et al.*, 126
6. *Same.—When Perfected.*—An appeal is taken to the Supreme Court when the transcript is filed in the office of the clerk; and where judgment below was rendered June 22d, 1868, and the transcript was filed in the office of the clerk of the Supreme Court June 20th, 1871, the appeal was taken within three years from the rendition of the judgment. *Id.*

7. *Evidence.—Conflict.*—Where there is a direct and irreconcilable conflict in the evidence, this court will not upon the evidence disturb the verdict of the jury. *Baker v. Farmbrough et al.*, 240
8. *Same.—Contradiction.*—Although there be contradiction and uncertainty in the evidence, if it reasonably sustain the finding of the court below, this court will not disturb such finding. *Peters et al. v. Rader*, 305
9. *Demurrer.*—Where a cause has been tried on issues joined upon a complaint containing two paragraphs, one defective and the other good; a demurrer to the former having been overruled, the record not showing that the cause was tried and the judgment rendered exclusively upon the good paragraph, the judgment will be reversed for error in overruling the demurrer to the defective paragraph. To sustain a judgment in such a case, the record must affirmatively show that the finding and judgment proceeded wholly upon the good paragraph. *Peery v. The Greensburgh, etc., Co.*, 321
10. *Brief.*—A brief, within the meaning of rule 14 of the Supreme Court, is a statement of the case for the information of the court. It should purport to furnish the court some aid in deciding the case, and should attempt to show why the judgment ought to be reversed or affirmed. *Gardner v. Stover*, 356
11. *Same.*—To say that counsel cannot discuss the reasons upon which the court below decided the case, and that the question is upon the sufficiency of the complaint, is not a brief. *Ib.*
12. *Waiver of Objection.*—In a cause appealed from a justice of the peace, if the parties appeared in the court to which the appeal was taken and went to trial without objection, an objection that no transcript of the proceedings before the justice was filed in the court below cannot for the first time be made in the Supreme Court. *Cromwell v. Baty*, 357
13. *Notice of Appeal.*—Where a part only of the defendants in a judgment appeal therefrom to the Supreme Court, without notice to their co-defendants as provided in section 551 of the code, the appeal will be dismissed. *Hugo v. McConnell et al.*, 380; *Barger et al. v. Manning*, 472
14. *Bill of Exceptions.—Documentary Evidence.*—Parties cannot, by agreement in writing, authorize the clerk, in making up a transcript for the Supreme Court, to annex to the record documents used in evidence, without copying them into the record and having them authenticated as other evidence. *Burdick v. Hunt et al.*, 381
15. *Comparison of Handwriting by Supreme Court.*—Upon a question as to the genuineness of a signature, the Supreme Court can decide nothing by an examination and comparison of signatures. *Ib.*
16. *Amendment.—Variance.*—An amendment which might have been made in the court below, to make a pleading correspond with the proof, will in the Supreme Court be deemed to have been made. *Hamilton v. Winterrowd et al.*, 393
17. *Assignment of Errors.*—Section 568 of the code (2 G. & H. 275) requires that the assignment of error shall be entered on the transcript. Attaching a copy is not a compliance with the statute. *Wiggs v. Koontz*, 430
18. *Bill of Exceptions.*—Where the evidence is not all in the record, this court cannot say that the finding is not supported by the evidence. *Montgomery v. Hamilton et al.*, 45
19. *New Trial.*—The Supreme Court has no power to grant a new trial; when a motion for a new trial has been made and has been ruled upon by an inferior court, its ruling may be reviewed in the Supreme Court, when the grounds upon which the court acted are properly shown by the record, and when it is assigned for error that the court improperly overruled or granted the motion. *Wilson et al. v. Root et al.*, 486
20. *Same.—Assignment of Error.*—Matters which are reasons for a new trial in the court below should not be assigned as error in the Supreme Court. *Ib.*

21. *Failure to Demur.—Assignment of Errors.*—A failure to demur to a complaint does not waive the right to call in question the jurisdiction of the court over the subject of the action and the sufficiency of the facts stated in the complaint; but to raise such questions for the first time in the Supreme Court, there must be an assignment of error that the court below did not possess jurisdiction of the subject-matter of the action, and that the complaint does not state facts sufficient to constitute a cause of action.

McGoldrick et al. v. Slevin et al., 522

22. *Assignment of Error.*—Where the overruling of a motion for a new trial is not assigned as error, the Supreme Court will not consider any error properly constituting a cause for a new trial. *Ramsey v. Randall et al.*, 549

TAX.

See INJUNCTION, 1; RAILROAD, 1.

TEMPERANCE.

See LIQUOR LAW.

TENDER.

See PLEADING, 9; VENDOR AND PURCHASER, 1.

TIME.

Twenty-eighth and Twenty-ninth Days of February.—Bill of Exceptions.—

In computing the number of days given, within which a bill of exceptions may be filed, the 28th and 29th days of February are to be counted as one day.

Porter et al. v. Holloway, 35

TRESPASS.

1. *Justification.—Pleading.*—In an action for trespass to real estate, where the defendant answers claiming to justify under a deed of conveyance, he must show that the deed was made before the date of the alleged trespass.

Moore v. Crase, 30

2. *Vindictive Damages.—Instruction.*—In an action for trespass to real estate, where there are no elements of malice, insult, or deliberate oppression, it is error to instruct the jury that they may allow vindictive damages.

Id.

TRUST.

See PARTITION.

Separate Real Estate of Wife.—If the separate real estate of a wife be exchanged for other lands, under an agreement that the deed shall be made to her, and the deed be taken in the name of her husband, without her consent, she has an equity to have the contract or trust enforced against the heirs of her husband.

Davis et ux. v. Davis et al., 561

TURNPIKE.

1. *Articles of Association.*—It is essential to the legal existence of a corporation organized under the act of May 12th, 1852, as amended by the act of 1859, authorizing the construction of plank, etc., roads, that the articles of association shall set forth the residence of each and every subscriber thereto. *Eakright v. The Logansport and Northern Indiana Railroad Co.*, 13 Ind. 404, criticised.

Busenback et al. v. The Attica and Bethel Gravel Road Co., 265

2. *Proceeding to Condemn Lands.—Damages.—Instructions.*—In a proceeding to condemn and appropriate lands for the use of a gravel road, where the lands are unimproved, it is not error to instruct the jury that they may

consider the value of the land appropriated, together with any injury to the residue naturally resulting from the appropriation and construction of the road, such as cutting fields into an inconvenient shape, destroying the convenience and advantage of water for stock, and rendering additional fencing necessary. *The Montmorency Gravel Road Co. v. Stockton*, 328

3. *Same*.—The damages are assessed in such cases once for all, and the jury should look to every circumstance resulting from the appropriation, present and future, which affects the present value of the land. *Ib.*

UNSOUND MIND.

See REAL PROPERTY, ACTION TO RECOVER, 1, 2.

VARIANCE.

See DRAINING ASSOCIATION, 1; SUPREME COURT, 16.

VENDOR AND PURCHASER.

See MORTGAGE, 1, 2, 8 to 11.

1. *Specific Performance.—Tender*.—Where a purchaser of real estate brings suit for the specific performance of an executory contract of sale, it is not necessary that he should make an unconditional tender of the purchase-money and pay the same into court. It is sufficient for him to tender the money on condition that a deed is made to him, and upon the refusal of the vendor to accept the money and perform his contract, the vendee may bring his action and show in the complaint such tender and refusal, and that he is ready, able, and prepared to pay whatever sum may be found due, upon a decree for a specific performance.

Lynch et al. v. Jennings, 276

2. *Statute of Limitations.—Demand*.—A. sued B. for the specific performance of a contract for the conveyance of real estate. In his complaint, A. alleged a tender and refusal of the purchase-money, and brought the same into court, and it remained in the hands of the clerk. After years of litigation, a final decree was rendered in favor of A. The executors of B. then demanded said sum of money of the administrators of the clerk, who had died, and on their refusal to pay, suit was brought for its recovery. Answer, that more than six years had elapsed since the right of action accrued, prior to the commencement of suit.

Held, that the statute of limitations did not commence to run against the plaintiffs until after a demand upon the defendants for the return of the money.

Ib.

3. *Incumbrances.—Consideration*.—The parol agreement of a vendee of mortgaged land to pay off the mortgage, as part consideration of the purchase, is valid. It is not within the statute of frauds, and need not be in writing, and may be proved by parol. It is an agreement to pay his own debt, not that of another; and in a proceeding to foreclose, the court may decree that the land be sold and render several judgments against the mortgagor and his vendee, and that, for any sum remaining unpaid after the sale of the mortgaged premises, execution be first levied of the property of such vendee.

McDill v. Gunn et al., 315

VENUE.

See CRIMINAL LAW, 3.

VERDICT.

See PRACTICE, 14 to 17.

WAIVER.

See DEMAND, 1, 2; EVIDENCE, 7; PRACTICE, 1.

WAY.

1. *Appendant*.—If a right of way is appendant or appurtenant to land conveyed, the right of way will pass by the deed of conveyance, and not by a separate quitclaim deed. *Moore v. Crase*, 30
2. *Same*.—A way is appendant or appurtenant when it is incident to an estate, one terminus being on the land of the party claiming. It must inhere in the land, concern the premises, and be essentially necessary to their enjoyment. It is of the nature of a covenant running with the land, and like it must respect the thing granted or devised, and must concern the land or estate conveyed. *Id.*
3. *Same*.—*Appendant*.—*In Gross*.—A way appendant cannot be turned into one in gross, because it is inseparably united to the land to which it is incident; so a way in gross cannot be granted over to another, because of its being attached to the person. *Id.*

WILL.

1. *Undue Influence*.—Advice, persuasion, or entreaty does not constitute undue influence. The influence that will vitiate a will must be such as in some degree to destroy the free agency of the testator and constrain him to do what is against his will, but what he is unable to refuse or too weak to resist. *Rabb et al. v. Graham et al.*, 1
2. *Power of Disposition by Will*.—A father may by his will give his property to some of his children, to the exclusion of others, and he may give it to an entire stranger, to the exclusion of his children; and it must, as a general rule, be left to him to determine the sufficiency of the reasons for so doing. *Id.*
3. *Construction*.—A will recited as follows: "I direct, first, that my brother," S., "be requested and entrusted with six hundred dollars of the money which I now have, for the purpose of purchasing by entry wild lands in the State of Missouri or Iowa, as he may think proper, for my heirs, equally dividing and entering the lands in their several names, to wit," etc. "I also direct that the whole of my real and personal estate, except as hereinbefore mentioned, shall be and remain the absolute property of my beloved wife, so long as she remains my widow, and that she have the entire control of the same as she may seem proper; and if provided she shall marry, then I direct that an administration shall be had upon all my estate, except as beforesaid, and that the same be distributed according to law." *Held*, that the estate here created was a fee simple to the wife. *Spurgeon v. Scheible et al.*, 216
4. *Same*.—*Partial Intestacy*.—A construction of a will which would result in partial intestacy is to be avoided, unless the language of the will is such as to compel such construction. *Id.*
5. *Mortgage*.—*Election*.—*Estoppel*.—The owner of certain real estate made a will, in which he devised to his wife one-third of such real estate and to one of his sons two-thirds. Afterward, he executed to the same son certain promissory notes and also, to secure them, a mortgage on the whole of the land previously devised. The mortgagor afterward died, leaving the widow, the said son, and also a number of other heirs-at-law him surviving, said will being unrevoked and said mortgage being in force and unsatisfied. Afterward, the son in whose favor the will and mortgage had been made commenced a suit to foreclose the mortgage, making defendants the widow and other children and grandchildren of the deceased mortgagor, in his complaint alleging that the defendants were "heirs" of said deceased mortgagor; which proceeding to foreclose was dismissed by the plaintiff. *Held*, that the doctrine of election did not apply; that his attempt to foreclose the

mortgage, he being also a devisee of the same land, was not an election to claim under the mortgage or a waiver or relinquishment of any right he might have had under the will.

Held, also, that such attempt did not constitute an estoppel. It is only where the point in issue has been determined that the judgment is a bar. If the suit is discontinued, or the plaintiff becomes nonsuited, or for any other cause there has been no judgment of the court upon the matter in issue, the proceedings are not conclusive. The mere fact of bringing the suit to foreclose the mortgage, the complaint alleging that the defendants were "heirs" of the mortgagor and seeking to foreclose their equity of redemption, the suit having been dismissed, did not estop the devisee from asserting his claim under the will; nor did the fact that expenses were paid by the defendants to such suit of foreclosure in defending the same create an estoppel.

Winship et al. v. Winship et al., 291

6. *Life Estate*.—A will contained the following clause: "To my wife, Rachel, * * * I will and bequeath the eighty acres whereon the house and barn and most of the improvements are of the home place, and which, together with the home place, during her natural life to her, and dispose of the same as she may think best for the interest and comfort of herself and my children." After the death of the testator, the widow sold and conveyed by quitclaim deed the real estate described in the will.

Held, that the widow, and her vendee, took an estate only for the life of the widow.

Fraiser v. Hassey et al., 310

7. *Construction of.—Partition*.—A testator, having four children, all minors, by his will provided that the widow should have the management of his real estate until the oldest son should arrive at twenty-one years of age, and use the proceeds for the support of the family and to keep the property in order, and provided that the surplus might be put at interest for the use of the widow and children; and when the oldest son should arrive at the age of twenty-one years, his share of the real estate should be set off to him; and that the other heirs, as they should respectively become of full age, should have their respective shares set off to them. After becoming of age, and while the other children were minors, the oldest son brought an action for partition, making the will a part of his complaint, and asked for entire partition among all the heirs, and the widow for herself, and as guardian of the minor heirs, answered, asking that full partition be made.

Held, that the widow was entitled to have one-third of the real estate set off to her, and the oldest son one-fourth of the residue set off to him, and that the minor heirs were not entitled to have partition.

Brown et al. v. Brown, 474

WITNESS.

See DECEDENTS' ESTATES, 6; EVIDENCE, 4, 6; GRAND JUROR, 1; HUSBAND AND WIFE, 7.

Competency.—Administrator.—Parties.—Promissory Note.—In an action by an administrator upon a joint promissory note executed to his decedent by two defendants, of whom one has been served with process, and the other has not been served, as to whom a return of "not found" has been suggested and the cause continued, the defendant not found remains a party to the action, and is not a competent witness, under the statute, unless required to testify by the administrator or the court trying the cause.

Jenks v. Opp, Adm'r, 108

END OF VOLUME XLIII.

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